

No. 11000

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY  
and FEDERAL DEPOSIT INSURANCE  
CORPORATION,

Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Oregon

**FILED**

MAY - 9 1945

**PAUL P. O'BRIEN,**  
CLERK



No. 11000

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY  
and FEDERAL DEPOSIT INSURANCE  
CORPORATION,

Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Oregon





## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of James C. Dezendorf .....	70
Affidavit in Opposition to Motion to Amend Pre-Trial Order and for a New Trial.....	72
Amended Pre-Trial Order .....	2
Appeal:	
Certificate of Clerk to Transcript of Record on .....	113
Notice of .....	78
Order re Printing of Exhibits in Record on	117
Statement of Points and Designation of Record on .....	115
Stipulation re Printing of Exhibits on....	116
Certificate of Clerk to Transcript of Record on Appeal .....	113
Designation of Record, Statement of Points and	115
Exhibits for Defendant:	
Pre-Trial 34—Shortages by Years.....	79
Exhibits for Plaintiff:	
Pre-Trial 39—Certified Copy of Resolution of Board of Directors Adopted Sept. 1, 1942 .....	79

## Exhibits for Plaintiffs—(Continued)

Pre-Trial 40—Agreement, Aug. 29, 1942, Between Harney County National Bank and the Federal Deposit Insurance Cor- poration .....	88
Findings of Fact and Conclusions of Law.....	54
Judgment Order .....	66
Motion to Amend Pre-Trial Order and for a New Trial .....	68
Affidavit in Opposition to .....	70
Names and Addresses of Attorneys of Record..	1
Notice of Appeal .....	78
Opinion .....	32
Order Denying Plaintiff's Motion for New Trial and to Amend the Pre-Trial Order.....	77
Order re Printing of Exhibits in Record on Ap- peal .....	117
Pre-Trial Order, Amended .....	2
Motion to Amend .....	68
Statement of Points and Designation of Record on Appeal .....	115
Stipulation re Printing of Exhibits on Appeal..	116

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

HAMPSON, KOERNER, YOUNG & SWEET,  
DEY, HAMPSON & NELSON,  
JAMES C. DEZENDORF,

800 Pacific Bldg., Portland, Ore.

For Appellant.

HUNTINGTON, WILSON & DAVIS,  
W. M. HUNTINGTON,  
ROLAND DAVIS,

514 Porter Bldg., Portland, Ore.,

For Appellee.

ROBT. F. MAGUIRE,  
R. R. BAILEY,  
MAGUIRE, SHIELDS & MORRISON,

Pittock Block, Portland, Ore.,

For Inter-pleaded Defendant.

In the District Court of the United States  
for the District of Oregon

Civil No. 1412

RUBY M. BROWN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
Defendant,

FEDERAL DEPOSIT INSURANCE  
CORPORATION,

Inter-pleaded Defendant.

### AMENDED PRETRIAL ORDER

The above entitled action came on regularly for a pretrial conference on Monday, July 19, 1943, at 10:00 o'clock A.M., before the Honorable James Alger Fee, one of the Judges of the above entitled court. Plaintiff appeared in person and by and through Dey, Hampson & Nelson and James C. Dezendorf, her attorneys. The Defendant New York Life Insurance Company did not appear. The Defendant Federal Deposit Insurance Corporation, the Inter-pleaded Defendant, appeared by and through Maguire, Shields, Morrison & Biggs and Robert F. Maguire, its attorneys. The formal pre-trial conference adjourned Tuesday, July 20, 1943, with the understanding that an effort would be made by the parties to agree upon a pretrial order. Thereafter, the parties duly waived a jury and the



case was set for trial for Wednesday, August 11, 1943, at 10:00 o'clock A.M.

## AGREED FACTS

### I.

Plaintiff is a resident of the State of Oregon. Defendant New York Life Insurance Company is a corporation organized and existing under the laws of the State of New York and is authorized and licensed to engage in the life insurance business in the State of Oregon. The Harney County National Bank of Burns, Burns, Oregon, [26\*] is a national banking association, organized and existing under the laws of the United States. The Federal Deposit Insurance Corporation is a corporation organized under and by virtue of the laws of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

### II.

On November 27, 1935, New York Life Insurance Company, in consideration of the payment of the premiums therein specified, issued its policies of life insurance, Nos. 12748022 and 12748023, on the life of Edward N. Brown, in which policies Plaintiff, Ruby M. Brown, was named as beneficiary. In each of the said policies the New York Life Insurance Company agreed to pay to Ruby M. Brown, the beneficiary, the sum of \$10,000.00 upon receipt of due proof of the death of Edward N. Brown.

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

## III.

Edward N. Brown died on or about August 6, 1942, and due proof of his death was thereafter furnished to and received by New York Life Insurance Company and by reason thereof there became due and payable to Ruby M. Brown, the beneficiary, upon said policies, the total sum of \$20,582.00.

## IV.

New York Life Insurance Company, on or about August 18, 1942, issued, and on August 21, 1942, delivered to Plaintiff two checks, whereby it directed the United States National Bank of Portland (Oregon) to pay to the order of Plaintiff the total sum of \$20,582.00.

## V.

Plaintiff presented said checks to The United States National Bank of Portland (Oregon) for payment on September 4, 1942, and the said Bank failed and refused to pay Plaintiff any sum thereon and advised her that New York Life Insurance Company had previously countermanded payment thereof. [27]

## VI.

Prior to September 4, 1942, when said checks were presented for payment, the Federal Deposit Insurance Corporation notified the New York Life Insurance Company that it had information indicating that the money used in payment of premiums on the above mentioned policies were funds of the Harney County National Bank of Burns, Burns,

Oregon, and Federal Deposit Insurance Corporation notified New York Life Insurance Company that it would claim the right to receive the proceeds of said policies of insurance. New York Life Insurance Company thereupon stopped payment on the two checks above mentioned.

#### VII.

New York Life Insurance Company does not have nor claim any right or interest in or to the proceeds of said policies of insurance and it is entitled to be discharged from any further liability to either Plaintiff or the Federal Deposit Insurance Corporation upon payment into the registry of this Court of the sum of \$20,582.00, less its costs and disbursements herein incurred and such sum as may be allowed to it for attorneys' fees.

#### VIII.

Edward N. Brown paid the premiums due on the New York Life Insurance Company policies issued on his life by checks, which said checks were received at the Boise, Idaho, office of the New York Life Insurance Company on the following dates:

Policy No. 12748022	Policy No. 12748023
November 29, 1935	February 6, 1936
October 21, 1936	January 11, 1937
September 11, 1937	November 3, 1937
December 2, 1938	December 31, 1938
October 21, 1939	October 21, 1940
December 28, 1940	



## IX.

All of the checks forwarded by Edward N. Brown in payment of premiums and received by the New York Life Insurance Company were [28] drawn upon the Harney County National Bank of Burns, Burns, Oregon, except the payment of December 28, 1940, upon policy No. 12748022, and it has been impossible to determine upon what Bank said check was drawn.

## X.

The check received by the New York Life Insurance Company on November 29, 1935, in payment of the first premium on policy No. 12748022 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on December 2, 1935. The records of the bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: October 31, 1935, \$160.00, salary from said bank for the month of October, 1935; November 30, 1935, \$160.00, salary from said bank for the month of November, 1935; December 2, 1935, \$150.00, currency. The ledger sheet balance on December 2, 1935, was \$349.56, composed of said items.

## XI.

The check received by the New York Life Insurance Company on October 21, 1936, in payment of the second premium on policy No. 12748022 was drawn upon Edward N. Brown's special account in the Harney County National Bank of Burns, Burns,



Oregon, and was charged against his account on October 23, 1936. The records of the bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: October 16, 1936, \$300.00, D. W. Williams; (1) October 13, 1936, \$45.00, Paul Jackson, repayment; (2) October 3, 1936, \$336.12 (American Aircraft \$250.00, currency \$50.00, transfer from personal account \$36.12); (3) September 2, 1936, \$1154.88 (transfer from personal account \$145.48, Blyth & Co. \$1,009.40); August 24, 1936, \$242.85, J. R. Jenkins & Son. The ledger sheet balance on October 23, 1936, was \$2045.00, composed of said items.

Neither Federal Deposit Insurance Corporation nor Plaintiff [29] have any direct evidence to explain items (1) and (2), except that with respect to that portion of item (2) "American Aircraft \$250.00", it is admitted that a check in that amount drawn by American Aircraft Co. and payable to Edward N. Brown was received by him on that date. With respect to that portion of item (2) "transfer from personal account \$36.12", it is admitted that there is a charge against Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, on October 3, 1936, in the amount of \$36.12, at which time the records of the Bank disclose credits to his personal account and contain corresponding deposit slips, carrying notations as follows: September 30, 1936, \$195.00, September salary; August 31, 1936, \$195.00, August salary. The ledger sheet balance on October 3, 1936, in his personal account was \$204.72, composed of

said items. With respect to that portion of item (3) "Blyth & Co. \$1,009.40", Blyth & Co.'s records show that it remitted to Edward N. Brown this amount as the proceeds of the sale of a Miller and Lux \$1,000.00 bond. It is admitted that there was no Miller and Lux bond among the assets of the Bank. With respect to that portion of item (3) "August 24, 1936, \$242.85, J. R. Jenkins & Son", it is admitted that checks totaling that amount were on that date deposited to the credit of Edward N. Browns' account and said checks were charged against the accounts of the drawers.

## XII.

The check received by the New York Life Insurance Company on September 11, 1937, in payment of the third premium on policy No. 12748022 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on September 14, 1937. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: August 31, 1937, \$225.00, salary from said Bank for the month of August, 1937; July 31, 1937, \$225.00, salary for the month of July, 1937; June 30, 1937, \$225.00, salary for the month of June, 1937. The ledger sheet balance on September 14, 1937, was \$533.49, composed of said items.

## XIII.

The check received by the New York Life Insurance Company [30] on December 2, 1938, in payment of the fourth premium on policy No. 12748022 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on December 5, 1938. The records of the bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) December 5, 1938, \$175.00, from Edward N. Brown grain account; November 30, 1938, \$250.00, salary from said Bank for the month of November, 1938. The ledger sheet balance on December 5, 1938, was \$313.06, composed of said items.

With respect to item (1), it is admitted that Edward N. Brown's grain account shows a charge against that account in that amount on that date.

## XIV.

The check received by the New York Life Insurance Company on October 21, 1939, in payment of the fifth premium on policy No. 12748022 was drawn upon Edward N. Brown's special account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on October 24, 1939. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: October 24, 1939, \$350.00, Kidwell and Caswell; (1) October 23, 1939, \$656.90 (cash \$250.00, Kidwell and



Caswell \$406.90). The ledger sheet balance on October 24, 1939, was \$366.78, composed of said items.

That portion of item (1) "Kidwell and Caswell \$406.90" represents the amount received by Edward N. Brown from Kidwell and Caswell on October 23, 1939, for the sale of livestock on the North Portland Market. (See Paragraph E.)

### XV.

The check received by the New York Life Insurance Company on February 6, 1936, in payment of the first premium on policy 12748023 was drawn upon Edward N. Brown's special account in the [31] Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on February 10, 1936. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) February 10, 1936, \$64.00, Pete Obiaque; (2) February 5, 1936, \$144.94, transfer from Edward N. Brown's personal account; (3) February 5, 1936, \$247.88, Burns Lodge; December 31, 1935, \$278.76, checks. The ledger sheet balance on February 10, 1936, was \$661.20, composed of said items.

With respect to item (1), it is admitted that on or about February 10, 1936, Pete Obiaque paid Edward N. Brown \$64.00 for rental of some pasture land, owned or controlled by Edward N. Brown. With respect to item (2), it is admitted that on February 5, 1936, there is a charge against Edward N. Brown's personal account for \$144.94, at which time the records of the Bank disclose credits to

his personal account and contain corresponding deposit slips, carrying notations as follows: January 30, 1936, \$195.00, January salary; December 31, 1935, \$75.00, dividends on Harney County National Bank stock; December 31, 1935, \$165.00, December salary. The ledger sheet balance on February 5, 1936, in his personal account was \$331.91, composed of said items. With respect to item (3), it is admitted that on or about February 5, 1936, Burns Lodge gave Edward N. Brown \$247.88 to purchase city bonds to be used in payment of street liens against property owned by it and that Burns Lodge subsequently received from Edward N. Brown the city bonds.

#### XVI.

The check received by the New York Life Insurance Company on January 11, 1937, in payment of the second premium on policy No. 12748023 was drawn upon Edward N. Brown's special account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on January 13, 1937. The records of the Bank disclose credits to said account and contain corresponding deposit [32] slips, carrying notations as follows: (1) December 31, 1936, \$124.40 (dividends from Harney County National Bank Stock \$75.00, transfer from his personal account \$49.40); December 16, 1936, \$300.00, D. W. Williams; October 13, 1936, \$45.00, Paul Jackson, repayment; October 3, 1936, \$336.12 (American Aircraft \$250.00, currency \$50.00, transfer from Edward N. Brown personal account

\$36.12) ; September 2, 1936, \$1,154.88 (transfer from Edward N. Brown personal account \$145.48, Blyth & Company \$1,009.40) ; August 24, 1936, \$242.85, J. R. Jenkins & Son. The ledger sheet balance on January 13, 1937, was \$1,872.20, composed of said items.

With respect to item (1), it is admitted that on December 31, 1936, Edward N. Brown received and deposited in his special account \$75.00 received as a dividend on stock owned by him in the Harney County National Bank of Burns, Burns, Oregon. With respect to that portion of item (1) "transfer from his personal account \$49.40", it is admitted that on that date there is a charge against Edward N. Brown's personal account for \$49.40, at which time the records of the Bank disclose credits to his personal account and contain corresponding deposit slips, carrying notations as follows: December 31, 1936, \$195.00, December salary; November 30, 1936, \$195.00, November salary; October 31, 1936, \$195.00, October salary. The ledger sheet balance on December 31, 1936, in his personal account was \$260.82, composed of said items. For explanation of the balance of the items see explanation in **paragraph XI** above, since the items are the same.

## XVII.

The check received by the New York Life Insurance Company on November 3, 1937, in payment of the third premium on policy No. 12748023 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns,



Burns, Oregon, and was charged against his account on November 8, 1937. The records of the Bank [33] disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) November 3, 1937, \$109.38 (Hearst Publication Bond \$100.00, coupons \$9.38); October 30, 1937, \$225.00, salary from said Bank for the month of October, 1937; October 21, 1937, \$240.00, currency. The ledger sheet balance on November 8, 1937, was \$544.44, composed of said items.

With respect to item (1), it is admitted that this represents the proceeds of the sale of a Hearst Publication Bond, which had been given to Edward N. Brown some years before by Plaintiff and Leon M. Brown.

### XVIII.

The check received by the New York Life Insurance Company on December 31, 1938, in payment of the fourth premium on policy No. 12748023 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on January 3, 1939. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: December 31, 1938, \$75.00, dividends on stock of Harney County National Bank of Burns, Burns, Oregon; December 31, 1938, \$250.00, salary from said bank for the month of December, 1938. The ledger sheet balance on January 3, 1939, was \$309.81, composed of said items.

## XIX.

The check received by the New York Life Insurance Company on October 21, 1940, in payment of the fifth premium on policy No. 12748023 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on October 24, 1940. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) October 23, 1940, \$833.00, F. M. Beck check; (2) October 22, 1940, \$2,437.60, Thomas and Frank Mahon check. The ledger sheet balance on October 24, 1940, was \$3191.35, composed of said items.

With respect to items (1) and (2), it is admitted that they [34] represent the proceeds of livestock sold by Edward N. Brown, which were deposited to his personal account.

Note as to Paragraphs X to XIX, inclusive: Defendant Federal Deposit Insurance Corporation does not admit that any of said credit items were proper items of credit or that on the dates they were recorded that Edward N. Brown had any actual credit balance in said Bank.

## XX.

Federal Deposit Insurance Corporation has paid all of said Bank's customers' or depositors' accounts in which shortages were claimed, irrespective of whether the alleged loss was more or less than \$5,000.00.



## XXI.

Federal Deposit Insurance Corporation filed a claim in the Estate of Edward N. Brown, deceased, on or about February 11, 1943, in the amount of \$388,669.26 as the amount determined due as of January 1, 1943, reserving the right to file an amended claim, should further investigation disclose further debits and credits which should be added to the claim. On or about the 28th day of July, 1943, the Federal Deposit Insurance Corporation filed a supplemental claim in the Estate of Edward N. Brown, deceased, in the amount of \$24,182.09.

## XXII.

Continuously between the date the policies of insurance were issued and the death of Edward N. Brown, he was employed by the Harney County National Bank in the following capacities, during the times hereinafter mentioned:

Assistant Cashier, January 12, 1932, to January 11, 1938. Director, January 7, 1936, to August 6, 1942. Vice President, January 11, 1938, to August 6, 1942, and had been employed by said Bank as teller and in other capacities at least in 1927 and until January 12, 1932. [35]

That the directors of said Bank, being entirely ignorant of any wrongful acts, embezzlements, misappropriations or defalcations on the part of the said Edward N. Brown of any of the property or assets of the Bank or of any breaches of trust of duty on his part, authorized and fixed his salary in the monthly sums mentioned in said deposit slips as

salaries and authorized him to draw on said amounts.

### XXIII.

Edward N. Brown took his own life on August 6, 1942, while the National Bank Examiners were making an examination of the Harney County National Bank of Burns, Burns, Oregon.

### XXIV.

At all times herein concerned, the Harney County National Bank of Burns, Burns, Oregon, paid to Federal Deposit Insurance Corporation the necessary assessments, so that its depositors' accounts were insured by Federal Deposit Insurance Corporation in accordance with the provisions of 12 U.S.C.A., Section 264.

[Notation]: Amendment allowed F 8/3/43.

### STIPULATED EVIDENCE

The Federal Deposit Insurance Corporation contends that the following facts are material on the question of whether the payments of premiums on said insurance policies were paid by funds or property of the Harney County National Bank:

#### A.

That during the period of Edward N. Brown's employment by the Bank he embezzled and misappropriated funds and property of the bank in the following amounts:

\$176,963.06	(Exhibit 26)
67,500.00	(Exhibit 26)
1,480.00	(Exhibit 26)

142,726.20	(Exhibit 26)
17,143.61	(Exhibit 30)
7,038.48	(Exhibit 30)
1,752.16	(Exhibit 35)
500.00	(Exhibit 37)
1,674.22	(Exhibit 36)

B.

That of said sums the said Edward N. Brown embezzled and misappropriated funds and property of the Bank by means of false entries, withheld deposits made by depositors of said Bank, and by unauthorized and wrongful withdrawals from credits and accounts of depositors in said Bank as follows: [36]

	A Net Amt. of:	
Prior to the Year 1935.....	\$	5,869.25
In the Year 1935.....		12,893.21
In the Year 1936 .....		3,031.52
In the Year 1937 .....		17,996.84
In the Year 1938 .....		40,982.14
In the Year 1939 .....		93,203.44
In the Year 1940 .....		39,780.33
In the Year 1941:		
Embezzlements	\$93,272.41	
Restitutions	93,762.40	
	-----	
Excess of		
restitutions	489.99	489.99
In the Year 1942.....		10,319.61
	-----	
Total.....	\$223,586.35	
		(Exhibit 34)



## C.

That by reason of an agreement with the Harney County National Bank dated August 29, 1942, the Federal Deposit Insurance Corporation acquired, and ever since said date has been the owner of, the assets of the Bank, including all contracts, rights, claims, demands and choses in action or causes whatsoever, pending causes of action, and judgments, whether known or unknown, which the said Bank owned, held or had, or owns, holds or has against any person or persons whomsoever, including among other things all those against its officers, directors or employees or their sureties arising out of any action of any such persons in respect to the Bank or its property, or arising out of the nonperformance or manner of performance of their duties, and any claims against any person for money or property of the Bank or for damages which the Bank may have or own.

The plaintiff admits the execution of the document but denies that the Federal Deposit Insurance Corporation succeeded or became subrogated to the rights of the Bank or its depositors. [37]

Plaintiff does not concede the truth of the facts alleged in paragraphs A to C, admits that Federal Deposit Insurance Corporation could produce evidence to support the facts as alleged, waives their production, contends that said evidence is incompetent, irrelevant and immaterial, and, if it is admitted at the trial or considered by the Court, the Plaintiff requests that the following facts be admitted and considered. If the following facts are

admitted and considered, Federal Deposit Insurance Corporation admits that Plaintiff could produce evidence to support the facts as alleged, waives their production, and contends that said evidence is incompetent, irrelevant and immaterial.

A.

Plaintiff and her husband, Leon M. Brown, during the period herein concerned, loaned various sums of money to Edward N. Brown, and made gifts to him as follows:

February 27, 1930, Leon M. Brown made a gift of \$2300.00.

May 3, 1930, Leon M. Brown loaned \$339.00.

September 20, 1938, Leon M. Brown loaned \$500.00.

April 22, 1939, Leon M. Brown loaned \$500.00.

September 19, 1939, Leon M. Brown loaned \$500.00.

May 29, 1940, Leon M. Brown loaned \$500.00.

July 15, 1940, Leon M. Brown loaned \$500.00.

September 14, 1940, Plaintiff loaned \$500.00.

September 20, 1940, Plaintiff loaned \$500.00.

July 11, 1941, Leon M. Brown loaned \$500.00.

All of the loans were repaid by Edward N. Brown before his death.

V.

From time to time while Edward N. Brown was employed at the Bank (the exact dates not being known), Edward N. Brown sold for Plaintiff and Leon M. Brown the following securities: [38]

## Bonds

\$1,000.00 Minneapolis, St. Paul & St. Marie  
Railway.

\$1,000.00 Great Northern Railway General Mort-  
gage Bond.

\$1,000.00 Miller and Lux.

\$500.00 American Telephone and Telegraph.

## Stocks

17 shares Masonic Building Association.

2 shares Seattle Chamber of Commerce.

2 shares Northwestern Electric Company.

2 shares Hearst Publications, Inc.

Plaintiff and Leon M. Brown received all the  
proceeds from the sale of the securities above men-  
tioned before the death of Edward N. Brown.

## C.

Between 1935 and the time of his death, Edward  
N. Brown acquired ranches in the vicinity of Burns,  
Oregon, by purchase and on contracts, as follows:

[39]

November 16, 1935: Acquired Porter-Field tract  
from Harney County Sheriff, paid \$73.93.

March 9, 1938: Acquired assignment of mortgage  
upon the Sieloff ranch from Felix Urizar, paid  
\$175.00.

March 14, 1938: Acquired portion of Sieloff ranch  
by deed from Frank Kueny, paid \$10.00.

April 5, 1938: Acquired Denstedt ranch from the  
State Land Board, paid \$160.00.

April 13, 1938: Acquired Gozad and Denstedt  
ranches from Federal Land Bank, Spokane, paid  
\$700.00.



August 22, 1938: Acquired Allen field ranch from State Land Board, paid \$135.26.

February 11, 1939: Acquired Catterson ranch from Federal Land Bank, Spokane, paid \$150.00.

April 15, 1939: Acquired Max Sieloff and Katherine Sieloff land from Sheriff of Harney County, paid \$750.00.

July 13, 1940: Acquired Lee Iland ranch, paid \$10.00.

September 16, 1940: Acquired 718 acre ranch from the Sheriff of Harney County, paid \$360.00.

November 28, 1940: Acquired Bolton ranch, paid Federal Land Bank \$300.00.

December 28, 1940: Acquired ranch from J. R. Rush, paid \$100.00.

June 23, 1941: Acquired ranch from Francis Griffin, paid \$600.00.

July 12, 1941: Acquired four tracts of land north of Lawen, Oregon, paid Sheriff of Harney County \$312.50.

July 26, 1941: Acquired Dr. Iland Catterson ranch, paid Lee Iland \$10.00.

December 8, 1941: Acquired Sam Goodman ranch, paid Clarence Fitchett \$500.00.

#### D.

Edward N. Brown operated the ranches and properties above set forth, raised crops and ran livestock thereon from 1935 until [40] his death. He also rented and operated the following properties from plaintiff and Leon M. Brown:

Year	Description	Crop	Annual Rental Paid
1940-41	Jordan ranch (Ruby M. Brown 1/4 interest) .....	Hay	\$400.00
1940-41	Valley Ranch (M. Brown & Sons, Inc., owner).....	Hay, grain pasture	\$400.00

On July 12, 1935, Edward N. Brown entered into a contract with Bessie K. Hillman for the purchase of 2560 acres of land near Burns. The total purchase price to be paid was \$3508.84, which was paid in various installments until September 2, 1939, when the contract was paid in full and a deed to the property was executed to Edward N. Brown. This property was subsequently sold to the United States on February 27, 1940, for a consideration of \$10,060.00, which was represented by Government check mailed to Edward N. Brown from Portland, Oregon, on March 16, 1940. [41]

### E.

During the period commencing October 4, 1938, until the end of 1940, Edward N. Brown sold livestock on the North Portland market through Kidwell and Caswell, North Portland Commission Merchants and remittances were made to him by Kidwell and Caswell as follows:

October 24, 1938	\$ 492.92
November 21, 1938	257.86
November 21, 1938	320.85
December 19, 1938	477.86
January 23, 1939	688.74
February 6, 1939	1,052.10
March 1, 1939	524.93



March 13, 1939	368.39
April 10, 1939	662.78
September 6, 1939	716.30
October 2, 1939	524.81
October 9, 1939	502.11
October 16, 1939	893.63
October 19, 1939	480.91
October 19, 1939	406.90
October 26, 1939	466.57
November 7, 1939	10.55
December 20, 1939	341.30
January 24, 1940	264.67
July 2, 1940	279.78
September 23, 1940	793.94
October 7, 1940	984.49
October 24, 1940	428.73
November 18, 1940	72.75
November 19, 1940	345.10
December 2, 1940	1,709.53
December 16, 1940	1,284.80
	<hr/>
	\$15,353.30

## F.

During the period herein involved, Edward N. Brown maintained in the Harney County National Bank a commercial account, known as a "grain account." Attached hereto, marked Exhibit "A", is a photostatic copy of the ledger cards covering said account, showing the debits, credits and balances carried in said account.

## G.

During the period herein involved, Edward N. Brown had a savings account in the Harney County National Bank of Burns, Burns, Oregon. Attached hereto, marked Exhibit "B", are photostatic copies of the ledger cards covering said account, showing the debits, credits [42] and balances carried in said account. This account was built up by Plaintiff and Leon M. Brown after the birth of Edward N. Brown, by gifts to him until the account reached \$1300.00 on July 2, 1931, after which all deposits and withdrawals were made by Edward N. Brown.

## H.

During the period herein involved, Edward N. Brown maintained in the Harney County National Bank a commercial account, known as a "steer account." Attached hereto, marked Exhibit "C", is a photostatic copy of the ledger cards covering said account, showing the debits, credits and balances carried in said account. [43]

## CONTENTIONS OF THE PARTIES

## A.

Federal Deposit Insurance Corporation contends that the premiums paid by Edward N. Brown upon the policies of insurance on his life issued by New York Life Insurance Company were paid from and out of the funds of the Harney County National Bank of Burns, Burns, Oregon, which said funds were wrongfully and unlawfully embezzled, appro-

priated and converted by the said Edward N. Brown and by reason thereof Federal Deposit Insurance Corporation became and were the owners of said policies of insurance and is entitled to a judgment and decree awarding to it the full sum deposited in the registry of this court by New York Life Insurance Company.

### B.

Plaintiff denies that Edward N. Brown paid the premiums upon the policies issued on his life by New York Life Insurance Company from funds embezzled, or misappropriated from the Harney County National Bank of Burns, Burns, Oregon, and contends that she, as the beneficiary under both of said policies, is entitled to a judgment and decree awarding to her the full sum deposited in the registry of this court by New York Life Insurance Company.

### C.

The Federal Deposit Insurance Corporation contends that it is the owner of all the assets, property, choses and rights of action and suit owned or possessed by the Harney County National Bank of Burns and that it is the owner of all the proceeds arising out of policies of insurance 12748022 and 12748023, being \$10,327.00 and \$10,255.00 respectively.

## ISSUES OF FACT TO BE DETERMINED

### I.

To what extent, if at all, the premiums on the



policies were paid with funds wrongfully embezzled or misappropriated from the [44] Harney County National Bank of Burns, Burns, Oregon?

## II.

What were the sources from which the premiums on policies were paid to the insurance company?

## ISSUES OF LAW TO BE DETERMINED

### I.

Whether Federal Deposit Insurance Corporation succeeded to or became subrogated to the Bank's rights, if any, as against the proceeds of the insurance policies upon the life of Edward N. Brown.

### II.

Whether the various premium payments were paid with funds belonging to Edward N. Brown or with funds wrongfully embezzled or misappropriated from the Harney County National Bank of Burns, Burns, Oregon.

### III.

Are the items of deposit which are constituted by salary paid by the Bank to Brown and placed in his account, moneys belonging to Brown which constitute an actual credit to the account?

### IV.

If Brown, at the time of drawing said salaries, was guilty of embezzlement, misappropriations, defalcations or other breach of trust in his dealings

with the Bank, was he entitled to any compensation from the Bank?

## V.

If it be held that Brown was not entitled to any compensation from the Bank, were the funds that he drew as compensation funds wrongfully embezzled, misappropriated or converted from the Bank?

## VI.

Must the Federal Deposit Insurance Corporation show that any particular item of deposit in Brown's account was embezzled or the proceeds of embezzled funds or property before it is entitled [45] to the benefit of any particular premium payment or is it entitled to the benefit of any and all premium payments unless plaintiff shows that any particular items deposited in Brown's account in fact belonged to Brown and were not embezzled from the Bank or the proceeds of embezzled funds?

## VII.

Does the fact that Brown embezzled and misappropriated or wrongfully converted moneys, funds or property belonging to the Bank automatically extinguish, without a charge or set off by the Bank, any items of deposit of his own funds in any account upon which checks in payment of premiums were drawn?

## VIII.

If it be found that Brown had embezzled, misappropriated or wrongfully converted funds or property of the Bank, exceeding the amount of any

items of deposit in his accounts, at or before the time of the charging of any check for premiums, whatever may have been the source of such items, is the Defendant entitled to the benefit of the premium payment so made?

## IX.

If no evidence appears as to the source of funds used in payment of the last premium, who is entitled to the benefit of that premium payment?

## X.

If the total of the deposits in any account at any time is composed of Brown's own funds and funds of the bank, who is entitled to the benefit of the premium payment made from said account if the premium payment be less than the amount of his own funds; if it be more than his own funds?

## XI.

It is conceded that the Oregon Supreme Court in *Jansen v. Tyler*, 151 Ore. 268, has announced a rule which, if applicable to this case, would award to Defendant that proportion of the proceeds [46] of the policies which the premiums paid from funds or property embezzled, misappropriated or wrongfully converted by Brown from the Bank bear to the total premiums paid.

The Defendant contends that if in any case Brown had a balance in his account made up in part of funds or property misappropriated, embezzled or wrongfully converted from the Bank and



part from other funds, Defendant is entitled to the benefit of the whole premium payment thus paid.

Plaintiff disputes this and contends that as a matter of law Brown would be held to have withdrawn from a mixed fund, first, his own funds, and if his own funds were sufficient to pay the whole premium payment that the Bank would not be entitled to any benefit from that payment.

Substituted page 8/3/43 F

Ex. No. Plaintiff's Pre-Trial Exhibits

1	Check dated February 27, 1930.....	\$230.00
2	Check dated May 3, 1930.....	339.00
3	Check dated September 20, 1938.....	500.00
4	Check dated April 22, 1939.....	500.00
5	Check dated September 19, 1939.....	500.00
6	Check dated May 29, 1940.....	500.00
7	Check dated July 15, 1940.....	500.00
8	Check dated September 14, 1940.....	500.00
9	Check dated September 20, 1940.....	500.00
10	Check dated July 11, 1941.....	500.00
11	Original savings account ledger.	
12	Grain account ledger.	
13	Hillman Contract, July 12, 1935.	
14	Hillman Deed, September 2, 1939.	
15	Letter, September 15, 1942.	
16	Steer account ledger.	
17	F. M. Beck check.	
18	F. M. Beck check stub.	
19	Leon M. Brown check stub.	
20	Vacant numbers.	
21	“ “	
22	“ “	

- Ex. No. Plaintiff's Pre-Trial Exhibits
- 23 Vacant numbers.
- 24 " "
- 25 " " [47]
- 26 Proof of claim.
- 27 Detail items of proof of claim.
- 28 Depositions of Leon M. Brown, Ruby M. Brown and Alfred L. Brown.
- 29 Deposit slips.
- 30 Supplemental claim of Federal Deposit Insurance Corporation, \$24,182.09.
- 31 Detail items making up Supplemental Claim of Federal Deposit Insurance Corporation.
- 32 Supporting data to the Supplemental Claim.
- 33 National Bank Examiner's report of February 11, 1942.
- 34 Recapitulation of shortages and restitutions from savings and commercial accounts prior to 1935 and subsequent to and including the time of death of Edward N. Brown.
- 35 7 checks drawn by Edward N. Brown and 2 tax receipts to Edward N. Brown; checks late 1934 to 1938, total \$2252.16.
- 36 4 checks: Check dated 7/15/31 to 20-30 Club, \$10.37; Check dated 9/12/40, \$363.85, Pari-Mutuel Fund; Check 7/23/42, \$800, Edward N. Brown Special Account; Check 6/1/42, \$500, Edward N. Brown Special Account.
- 37 Check June 11, 1942, \$500, Edward N. Brown Special Account.
- 38 List of notes payable to the bank but not carried in its loan and discount accounts.



- No. Ex. Plaintiff's Pre-Trial Exhibits
- 39 Certified copy of resolution of Board of Directors of Federal Deposit Insurance Corporation of September 1, 1942.
- 40 Agreement of August 29, 1942, Federal Deposit Insurance Corporation and Harney County National Bank of Burns, 16 pages.
- 40-A Copy of excerpts from last few pages of defendant's pre-trial exhibit 40.
- 41 Bank register.
- 42 Statement at close of business August 29, 1942, Harney County National Bank of Burns.
- 43 Minute book, Harney County National Bank of Burns, pages 535 to 730, and loose pages 311 to 534 of minute book.
- 44 Airplane license and date of purchase by Edward N. Brown.
- 45 Ledger Sheets, Harney County National Bank, Edward N. Brown, Special Account.
- 46 Ledger sheets, Harney County National Bank, Edward N. Brown General Account.
- 47 Savings general ledger.
- 48 Defalcation account, general ledger. [48]
- 49 2 pages, Ruby M. Brown Savings Account, with memorandum of reconciliation on final balance.
- 50 Ledger sheets, Leon M. Brown and Ruby M. Brown joint account.
- 51 Copy of Inventory and Appraisement in Estate of Edward N. Brown, Deceased. [49]

[Notation]: Substituted page. 8/3/43. F.

The foregoing is a pretrial order agreed upon at a conference between counsel and the court. It shall not be amended at the trial except by consent or to prevent manifest injustice. It supersedes the pleadings, which now pass out of the case.

The foregoing Pretrial Order is hereby approved and entered.

Dated at Portland, Oregon, this 13th day of August, 1943.

JAMES ALGER FEE

Judge

Order Approved:

/s/ JAMES C. DEZENDORF

Of Attorneys for Plaintiff

/s/ ROBERT F. MAGUIRE

except as to that portion providing that this order supersedes the pleadings.

Of Attorneys for Federal Deposit Insurance Corporation, Inter-pleaded Defendant.

[Endorsed]: Filed Aug. 13, 1943. [50]

---

[Title of District Court and Cause.]

June 12, 1944

OPINION

James Alger Fee, District Judge.

On November 27, 1935, the New York Life Insurance Company issued two policies of insurance on the life of Edward N. Brown in the sum of \$10,000.00 each, in which policies Ruby M. Brown was

named as beneficiary. The premiums on these policies were, with one exception, paid by checks drawn upon the Harney County National Bank of Burns, Oregon, and dated from November 29, 1935, to October 21, 1940.

Edward N. Brown was employed by the Harney County National Bank beginning in the year 1927, as teller, and in other capacities. On January 12, 1932, he became assistant cashier and on January 7, 1936, he also became a director. Upon becoming vice president on January 11, 1938, which office he held until his death on August 6, 1942, he gave up the position of assistant cashier.

During the years of his connection with the bank, [51] Brown embezzled \$416,000.00. The audit shows that the net amount of defalcations from customers' accounts alone amounted to approximately \$6,000.00 before 1935 and to over \$12,000.00 during that year. The schedule of further withdrawals from this source alone, during the stated periods, follows:

1936 .....	\$ 3,031.52
1937 .....	17,996.84
1938 .....	40,982.14
1939 .....	93,203.44
1940 .....	39,780.33

Brown carried a personal account, a special account and a commercial account at the bank in which he deposited sums from various sources. At no time was the total amount in all of these accounts, on any particular date, equal to the sum of his defalcations to that date from commercial accounts of the bank alone.



There were showings that Brown owned properties for which he had paid cash, that he had received loans and had sold property and received the purchase price, and that he had received gifts. Taking all these matters into consideration, the total amount thereof did not equal the amount of defalcations at any time. When the defalcations were about to be discovered by bank examiners, Brown committed suicide.

Ruby M. Brown, as beneficiary, made claim for the full amount of the insurance policies. Two checks were issued to her for a total sum of \$20,582.00 by the insurance company. Upon discovery that the Federal Deposit Insurance Corporation had a claim, the insurance company stopped payment upon these checks. Upon commencement of this action [52] by Ruby M. Brown, against the insurance company, it answered by depositing these funds in court and asking for an order requiring the claimants to interplead. Based upon a stipulation, an order entered discharging the New York Life Insurance Company of liability and setting up adversely the claims of plaintiff and the Federal Deposit Insurance Corporation.

A pretrial conference was held between the Federal Deposit Insurance Corporation, intervenor, which was the assignee of the assets of the Harney County National Bank, and Ruby M. Brown, the mother and beneficiary of the insurance policies on the life of Edward N. Brown. The results of this conference were crystallized in a pretrial order

which accurately defines the questions of fact and law to be answered by the court.

The matter thus arises between the beneficiary (who paid nothing therefor) of insurance policies upon the life of an embezzler and the assignee of the assets of the bank from which he embezzled. The cardinal factor is, that no item of the embezzled funds is traced directly into the premiums of the insurance policies, nor into the bank accounts, which Brown maintained with the Harney County National Bank.

This cause is complicated by the geometrical increase of the fact-pattern. Reduced primarily to the lowest terms, it is relatively simple of solution. First, if Brown were alive, could the bank recover from him the moneys paid out by virtue of checks drawn by him and from his transferee without notice, but without consideration.

The sole ground of recovery by the bank against the transferee would be that a trust had been erected by the [53] use of money of the bank in that transfer.

In order to further clear the ground, a distinction must be drawn between transactions which are consensual and in the normal course of business, and those which are colored by the proven fraud.

In the first category are placed dealings presumed to be innocent between solvent parties and which occur as ordinary commercial transactions. Thus, where a person brings cash into a bank which accepts it, the relation is that of debtor and creditor. When such a customer writes a check, the bank

pays out its own money but is entitled by the implied contract of deposit, to charge to the account of the customer, the amount thereof. If the customer writes and presents a check for more than he has originally turned over to the bank, there is no obligation to honor the demand. If the bank does pay the check, the transaction is a loan to the customer. The drawee, even if he paid no value therefor, is not liable to the bank.

If the bank loans money to the customer and the loan has matured, the bank has a right at any time to set off the amount owed to it against the amount owed by it. The bank thereby becomes liable only for the remaining balance of its debt to the customer, if there be any. But if the bank does not exercise this right of set-off, and in the face of the obligation of the customer to it, pays the check, it will have no recourse against the drawee of the check and can neither recapture the money nor follow the proceeds thereof.

Likewise, a solvent corporation may pay the personal debts of its officers and directors by corporate check and while there is no doubt of its right, itself or through its [54] assignee, to recover from the officers, it has no right against the payee, although the face of the check conveyed notice of the transaction and even though no value was given therefor.<sup>1</sup>

Also, a corporation which is solvent may make an agreement with its officers who are the sole

---

<sup>1</sup> Sweet vs. Lang, 14 F. (2d) 762.



stockholders, to make payments on insurance policies upon the lives of each of these respectively. If the agreement is carried out, there will be no right upon the part of the corporation or its assignee to recover the proceeds of the policies,<sup>2</sup> when it becomes insolvent.

Now there is a like distinction to be observed in considering relations which are given sanction by the courts as trusts. Shortly, express trusts and implied trusts such as those called resulting trusts, are consensual in origin. With such relationships, the presumptions of innocence and fair dealing apply. A constructive trust, on the other hand, is one imposed by law because of proven fraud, duress or undue influence exercised by the party charged.

In cases of express trusts, since it is assumed the trustee is acting innocently so long as he maintains a balance sufficient to cover the exact amount of the trust fund in a bank account, he is given credit for paying out his own funds in any expenditure.<sup>3</sup> Therefore, if he purchases life insurance by check upon the same bank account, the premiums are deemed his and the proceeds of the policies [55] inure to his beneficiary. If the trustee has two trust funds, one of which was given him for the purpose of insurance, and he did purchase insurance and there was not sufficient to cover both funds remaining, it will be presumed that he paid the prem-

---

<sup>2</sup> *Oliver vs. Northwestern Mutual Life Ins. Co.*, 2 F. Supp. 266.

<sup>3</sup> See *Portland Building Co. vs. State Bank of Portland*, 110 Oregon 61.

iums out of the fund entrusted to him for that purpose.<sup>4</sup> It is likewise held that where the trustee of an express trust reduces the amount in the bank where he had deposited his own funds and trust funds, below the sum of the trust moneys, and thereafter introduces into the account his own money, the latter sum is not in restitution, but is assumed to remain his in the absence of clear intention to make restitution. The presumption here again is in favor of fair dealing. It is assumed that the trustee withdrew the moneys from the trust in accordance with the purposes thereof. Finally, it is held that where there is an express trust, and the trustee is dead and cannot explain the mingling of funds, the burden of tracing remains with the cestui que trust.<sup>5</sup> Here again, the presumption of innocence prevails.

But the courts are equally clear in holding that where the trustee of an express trust comingles funds and is unable to explain the transaction, the whole becomes a trust fund.<sup>6</sup> This is because the presumption has been dissipated.

When the field of constructive trusts is approached, there is a relation imposed by the courts, between parties, to prevent unjust enrichment of one to the detriment of the other.<sup>7</sup> The funda-

---

<sup>4</sup>Bromley vs. Cleveland, C., C. & St. L. Ry. Company, 103 Wisconsin 562.

<sup>5</sup>Logan vs. Logan, 138 Texas 40.

<sup>6</sup>Tretheway vs. Tretheway, 16 California (2d) 133.

<sup>7</sup>Restatement of Restitution, Chap. 9.

mental difference between such different [56] concepts and the sanctions attendance thereon cause a wide divergence of results.

“An attempt to define a trust in such a way as to include constructive trusts as well as express trusts is futile, since a single definition which would include such distinct ideas would be so general as to be useless.”<sup>8</sup>

These basic concepts are then entirely distinct. The failure of the courts, on occasion, to recognize this distinction of the two concepts, called by the general name “trust”, leads to confusion. Generally speaking, the courts will compel one who obtains land, personal property or money from another by means of fraud, duress or undue influence, to hold the property as though he were a trustee of an express trust.<sup>9</sup> In other words, by analogy, the courts reflect many incidents of an express trust in reasoning about this creation, to prevent unjust enrichment.

While express trusts are fiduciary relationships, a constructive trust need not have its origin in such a bond. But the courts impose a constructive trust upon money or property obtained through breach of the obligations by one who takes advantage of the opportunities laid open in a fiduciary or confidential relationship.<sup>10</sup> There the duty is plain, and the breach is usually in violation of good ethics as

---

<sup>8</sup> Restatement of Restitution, page 641.

<sup>9</sup> Scott on Trusts, Vol. III, Sec. 468.

<sup>10</sup> Scott on Trusts, Vol. III, Sec. 468.



well as law. Thus, there is imposed the constructive trust, or the trust ex maleficio. There are two important differences between the incidents imposed by the court as a result of the finding of such a breach of duty involving transfer of property, and those applied [57] to an express trust. In the first place, there is no presumption of innocence or fair dealing because the imposition of a constructive trust presupposes a finding of bad faith and fraud. In the second place, the duty to restore all the avails of breach of faith requires a more flexible concept than the res which canalize the obligation of express trusts.

Turning to the situation in the instant case, we find that the high duty of Brown, in his confidential capacity as director-officer and trusted employee of the bank, was well defined. He was a fiduciary at all times. As a director he was bound by oath to diligently and honestly administer the affairs of the bank and was bound by oath not to violate himself or permit violations of the federal law relating to a national bank.<sup>11</sup> As an executive officer of the bank, he could not borrow or otherwise become indebted to it, or receive credit except under extremely limited conditions of which he was required to make a written report.<sup>12</sup> If he had known of any embezzlements or thefts from the bank, he would have been required to give the bank notice thereof in order to protect its interests. If he had

---

<sup>11</sup> 12 USCA Sec 73.

<sup>12</sup> 12 USCA Sec 375A.

known of any customer of the bank who had embezzled money therefrom or who was indebted thereto, and who had also placed money on deposit, if the facts were unknown to other agents of the bank, he would have been required to report it in order that the bank could protect itself by the exercise of the right of set-off or by other means within its power. [58]

There was a breach of this duty owed by Brown to the bank, and a wilful abuse of the confidence and trust placed in him. He embezzled and misappropriated money and other assets of the bank in a sum of over \$416,000.00. His realization of the criminal phases and consequences of his acts<sup>13</sup> and his moral and ethical responsibility therefor, caused him to take his own life.

The evidence indicates that large sums of money were taken directly from the bank. When notes evidencing loans made by the bank were paid, he kept the money. When deposits were made, he also took the money. He concealed all of these transactions from the other officers of the bank and the bank examiners, by a series of false entries of debits and credits on the books; by abstracting individual ledger sheets of customers from the files; by leaving notes, which had been paid, in the files of the bank as though they were outstanding; and by noting deposits which never became part of the assets of the bank, on the books of the depositors. Specifically, he violated his duty by stealing the

---

<sup>13</sup> 12 USCA Sec. 952.



cash of the bank; by failure to report the false entries; and by failure to notify the bank, its officers or agents, that he was in any manner indebted thereto.

The acts of Brown reveal a gross and flagrant breach of confidence imposed upon him by the bank. To this were attached the subtle tendrils which, because of the public nature of such an institution, pervaded the entire social structure of the community. He had taken an oath to guard the funds of the bank. By virtue of his position, he was enabled to carry out his unlawful enterprises. Finally, he prevented an accounting and escaped responsibility [59] for his violations of the trust and confidence reposed in him by killing himself when assured that all would be soon discovered. The moralities required that such conduct should not pass unpunished and that no one should receive, through the embezzler, the fruits of his unlawful peculations. However, extreme care must be taken in the examination of the applicable doctrines lest we be swayed to a moral end, despite the long established rules for the control of conduct in such tangled situations. Hard cases make bad law.

It is, however, established that there was a confidential relationship and a breach thereof. But according to the definition of a constructive trust, property must pass into the hands of the persons upon whom the courts impose it, or by his machinations, into the hands of third parties in order to lay a basis for recovery. There is no doubt that upon the discovery that the funds had been stolen,



the bank could have recovered from Brown in some of the forms of assumpsit or debt, but under the doctrines of restitution it could not recover specific property from him, or from a third party, unless it could be proven that the funds so abstracted from the bank were included therein, or were part of the purchase price thereof. Therefore, unless the stolen funds could be directly traced into specific articles of property, or into life insurance premiums, there could be no recovery by the bank of the articles or proceeds of the policies, notwithstanding the immoral and illegal operations of Brown and the great loss caused to the bank thereby.

But the ministers of the law are not confined to [60] one foundation for a constructive trust. They may follow fraud in all its protean forms. Once having established that the acts of Brown were in violation of his duty as a fiduciary, that quality is grasped firmly so that none of the benefits of recurring identity escape. "No man can take advantage of his own wrong." No one is held more strictly to the observance of this axiom than one whose fiduciary character is established. Therefore, before attempting to trace directly the funds actually taken by Brown, consideration should be given to the other duties which he violated and the consequences thereof.

His duty required him to disclose the fact of his indebtedness to the bank and to actually exercise the right of set-off for the bank as to any moneys which he might deposit therein irrespective of the

source.<sup>14</sup> His duty to the bank, likewise, required him to disclose the fact of his indebtedness and to accept no payments as salary or interests from the bank without full disclosure. He was, therefore, required, in view of all his knowledge of the facts, to apply all the salary payments to the liquidation of his indebtedness.

In *Phillips vs. Chase*, 203 Massachusetts 556, the defendant fraudulently procured the adoption, by his wife, of his own son by a former marriage in order to secure his wife's property for his son, thinking that if his son got the property the defendant would benefit thereby. After the death of both wife and son, the decree of [61] adoption was set aside in order to prevent the defendant from thus obtaining property unjustly. The court says:

“It was established by the answers given by the jury on the issues tried by them that the adoption of his son Woodruff was procured by a gross fraud practiced by Dr. Chase upon his wife and upon the court.

“The law will not allow a man to profit by his own wrong doing. Adopting and adapting the words of Mr. Justice Field in *New York Mutual Life Ins. Co. vs. Armstrong*, 117 U. S. 591, 600, 6 Sup. Ct. 877, 881, 29 L.Ed. 997, ‘it would be a reproach to the jurisprudence of the country’ if that were not so.

“It is settled that the English common law is not

---

<sup>14</sup>See *Atherton vs. Anderson*, 99 F. (2d) 883; *Live Stock State Bank vs. First National Bank of Fairfield, Idaho*, 300 Fed. 945.

open to that reproach. It has been twice laid down in Great Britain, once by Lord King in *Bovey v. Smith*, 1 Vern. 60, and once by Lord Redesdale in *Kennedy v. Daly*, 1 Sch. & Lef. 355, 379, that one who obtains property by a breach of trust and afterwards buys it from a bona fide purchaser for value does not get a good title to it although every one else in the world buying under those circumstances would get the title of the bona fide purchaser for value. And that has been decided in New York (*Clark v. McNeal*, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rept. 638) and in Maine (*Bailey v. Bailey*, 61 Me. 361).

Where a fiduciary is guilty of a breach of duty and acquires property or money by reason of his tortious conduct, the person to whom the duty is owing may have restitution of the benefit thus obtained, either from the faithless fiduciary or from the person who has obtained the property from him, except the latter be a bona fide purchaser for value.<sup>15</sup>

Even if this principle were not available, still constructive trusts are imposed where a person is entitled to recover money which he has paid to another on account of the terms of a contract which he supposed to exist and which, to the knowledge of the other party, did not actually [62] exist, whether

---

<sup>15</sup> Restatement of Restitution, Secs. 138, 190, 201; Restatement of Agency, Secs. 314, 403, 404 and 407; Restatement of Trusts, Secs. 197 and 226.



failure or consideration or some other defect was responsible for the condition.<sup>16</sup>

Brown paid practically all premiums on the policies in question out of accounts maintained at the same bank from which the tremendous sums above mentioned were stolen. If Brown had taken the money which he stole from the bank, and placed it in cattle, there would have been no question of the right of the bank to recover the cattle against anyone, except a holder for value in good faith. If Brown had not deposited money in the bank, but had, on the records thereof, set up entries showing that he had an account there when in truth he had none, and his checks were cashed which paid for cattle, it could not be held that the money so paid, was his money, and therefore the bank, under like circumstances, could recover.

But it is said that when Brown actually deposited money, it remained his until the bank actually exercised its right of set-off. The bank would, of course, have exercised this right if the defalcations were known to it at the time. This argument simply means that where a thief is successful in concealing his abstractions, the ill gotten gains will be protected, whereas, if the abstractions have been timely discovered, the losses could have been re-

---

<sup>16</sup>Restatement of Restitution, Secs. 15 and 16. "Payments as a result of fraud or misrepresentation are within the rule stated in this section. In such cases the payor is entitled to restitution although his mistake was not basic. The rules specially applicable are stated in Secs. 8, 9 and 28."

couped. Besides, as above noted, the failure to notify the bank or make the set-off was itself a fraud.

If Brown, as an officer, had set up a fictitious set of entries purporting to show that he had an account in the bank where he had made no deposits, and had paid for cattle with the proceeds, the result would be the same. If Brown had abstracted moneys from a till in the bank and [63] it had been proven that he deposited these moneys in a valid bank account in his own name, and had issued a check thereon in payment for cattle, and there were no more moneys in the account than those stolen, the bank could still recover the cattle. Where Brown, by virtue of his position as employee, director and officer, surreptitiously embezzled funds from the bank and thereafter deposited funds in the bank, the bank could not become indebted to him by virtue of such a deposit, until he had repaid all he had unlawfully abstracted. If then, in ignorance of the true situation, through his fraud, the bank honored checks on a suppositious account, it paid out its own money and not that of Brown. It was deluded into believing it paid the money of Brown, but the situation was no different than if Brown had made no deposits. Therefore, if Brown had bought personal property with this money of the bank, the latter could have recovered.

The options which one whose money is stolen has against the defaulter are clearly developed in the scholarly opinion of Judge Learned Hand in Pri-

meau vs. Granfield, 148 Fed. 480<sup>17</sup> which illuminates the field. A learned review of the subject is made by Judge St. Sure, writing for the Circuit Court of Appeals of the Ninth Circuit, in Republic Supply Co. of California vs. Richfield Oil Co., 79 F.(2d) 375, where like reasoning is followed.

The results of this reasoning were squarely stated by the court in McConnell vs. Henochsberg, 11 Tennessee Appellate 176, in an able and well worked out opinion upon facts almost identical with those in the case at bar. [64] Criticism is made of the application of that case to the situation here because of the fact that the court says "it is evident that several thousand dollars of this stolen money was used by Henochsberg and did actually pass through his bank accounts." The same finding could be made in the case at bar. However, this court does not place the decision here upon that basis, but upon the broad ground upon which the Tennessee court may also have relied, that the fiduciary who obtains property by breach of his obligations of confidence cannot equitably retain it.

American National Bank vs. King, 158 Oklahoma 278, deserves but slight consideration upon this issue. The court there held that a finding by the lower court that the premiums upon life insurance policies of its defaulting president were not paid by moneys of the bank, was not against a fair preponderance of the evidence. The principles of law

---

<sup>17</sup> Reversed on other grounds. Primeau vs. Granfield, 2 Cir. 193 Fed. 911.



relating to this feature were not discussed. The scholarly treatment of the remedy of restitution in like circumstance in the *Tennessees* case, is not mentioned, nor is that case cited. The court apparently entertained an emotional dislike for the doctrine of recovery of the proceeds of an aleatory contract and upon this feeling the case is founded.

The result is, that the *Tennessee* case is the only reasoned case upon this particular set of circumstances. Inasmuch as this decision squares with correct doctrine, as indicated by the previous discussion, it will be followed upon this point. All the money paid out upon checks issued by Brown against his paper accounts, belonged to the bank. By his fraud and false representations, he had prevented the bank from withholding his salary payments and from exercising [65] its right of set-off. Whether the payments were made for salary, or in honoring his checks, the bank made them by mistake of fact, pursuant to obligations which it believed it owed to Brown.

There is an alternative and equally convincing theory upon which the same conclusion may be founded. A review of the evidence which, although indirect, is convincing, makes clear that since Brown had no other sources of income initially, except his salary and the embezzled funds, that the bulk of the moneys which he deposited was from these springs. None of the stolen money can be traced directly thereto, but any fact may be proven by direct or indirect evidence. This leads to a consideration of an analogous line of cases where the defaulter

is not an employee of a bank but deposits the stolen funds therein. It will be apparent that the doctrine just held controlling would not apply under such circumstances. However, the courts reach the same result on the ground that once fraud has been proven, the doctrine of comingling of funds applies<sup>18</sup> and the constructive trustee will be liable if he does not segregate the fund. Since there is no presumption of innocence attaching, his death will not protect the beneficiaries.<sup>19</sup>

In the case of *Truelsch vs. Northwestern Mutual Life Insurance Co.*<sup>20</sup> there is an illustrative example of a situation where the defaulter was not an employee of the bank. [66] where he deposited his funds. The court there finds from indirect evidence that the money stolen was deposited in the bank and paid out by check upon the premium. The court disregards the question as to whether salary paid belonged to the employer, but treats the whole bank account, which may have contained some salary payments, as a comingled fund. The fact that the defaulter was dead did not prevent the application of this doctrine.

Thus it is, that all the moneys paid out by the

---

<sup>18</sup> *Massachusetts Bonding & Insurance Co. vs. Josselyn*, 224 Michigan 159; *Moseley vs. Fikes*, 133 Texas 386; *Long vs. Earle*, 277 Michigan 505; *Meyers vs. Baylor University*, 6 S.W. (2d) 393, 394.

<sup>19</sup> See *Meyers vs. Baylor University*, *supra*.

<sup>20</sup> *Truelsch vs. Northwestern Mutual Life Insurance Co.*, 186 Wisconsin 239.

bank belong to it. Therefore, if Brown had bought cattle with the proceeds, the bank could have obtained this property in specie from anyone except a bona fide purchaser for value. It is objected that while such property could have been recovered, it is a grave injustice to permit the recovery of the proceeds of an aleatory contract such as an insurance policy on the defaulter's life. However that may be, the question is settled in the State of Oregon by the decision in *Jansen vs. Tyler*, 151 Oregon 268, wherein is cited the able opinion of the elder Judge Sanborn reported as *Vorlander vs. Keyes*, 1 F. (2d) 67.

The *Vorlander* opinion just cited is repudiated by the Oklahoma court in *American National Bank vs. King*, *supra*. The rationale of the last mentioned opinion is that the wife and minor children of a defaulter have an investment in his life which should be given to them despite his wrongdoing.

In this case, the full amount of the insurance will not cover the peculations. There is a strong public policy against permitting a wrongdoer from thus taking advantage of his own wrong in order to build up an estate which the law will render secure for his successors as against the [67] person from whom the money was stolen.

The status of the wife or mother who is innocent of fraud and who is beneficiary of these "solemn contracts of insurance" according to plaintiff's brief, is well stated in the *Vorlander* case, 1 F.(2d) 67, 69-70:



“(4) Nor may another, in this case the wife, now the widow of the trustee ex maleficio, though herself innocent of the fraud, who has paid no consideration for the property purchased with the misappropriated funds or for their fruits, hold any of them against the cestui que trust, the owner thereof. A third person, unless he or she has in good faith acquired for value without notice a subsequent interest, seeking any benefit resulting from the misappropriation becomes a particeps criminis however innocent of the fraud in the beginning. Story’s Equity Jurisprudence (14th Ed.) Sec. 1666, 1667, 1668, 1669, 1670, Perry on Trusts, Sec. 127, 166.”

The bank would have, therefore, been entitled to recover all of the proceeds of the insurance which was paid for by checks drawn on the fictitious accounts of Brown therein. However, as to the payment of the premium made December 28, 1940, on policy No. 12748022, there is no evidence from what source this was made. Recovery could not then be had by the bank of the proceeds thereof on the theory that the payment was traced into a comingled fund. On the other hand, to allow recovery upon the theory that the funds were comingled when placed into the insurance policies, would violate the principles laid down in the Jansen case above cited.

Finally, it is objected that no matter what were the rights of the bank, the intervenor could not succeed to them because, having assumed the deposit liability of the bank the obligation was thus satisfied. It is assumed that this objection can be based

upon American Surety Company vs. Bank of California, decided by this court in an opinion reported in 44 F. Supp. 81, and affirmed by the Circuit Court [68] of Appeals for the Ninth Circuit in an opinion reported in 133 F.(2d) 160. The confusion of plaintiff seems to arise from the fact that no account is taken of the specific contract made in these two cases. The American Surety Company had there become responsible for the fidelity of the embezzler and when the proceeds of the wrongdoing were replaced, the obligation was completely satisfied. Here, the Federal Deposit Insurance Corporation was under duty simply to replace the assets, no matter how the loss occurred. It has no specific responsibility for the fidelity of Brown. When it carried out the obligation to replace the assets lost, it acquired the right of the bank against the wrongdoer. Both these cases are ruled by Oregon decisions. The American Surety Company case is governed by the opinion in the case of American Central Insurance Company vs. Weller, 106 Oregon 494. This case, on the other hand, is governed by the Jansen case above cited.

Findings and judgment may be prepared in accordance herewith.

[Endorsed]: Filed July 12, 1944. [69]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above entitled action came on for trial, the plaintiff appearing in person and by Mr. James Dezendorf of counsel, and the defendant, the Federal Deposit Insurance Corporation appearing by Mr. Robert F. Maguire of its counsel, and the defendant New York Life Insurance Company having heretofore inter-pleaded and by order of court heretofore made, having deposited in the registry of this court the sum of \$20,582.00, being the proceeds of the insurance policies on the life of Edward N. Brown which are the subject of this action, a pre-trial conference having heretofore been had and as a result thereof the court having made and entered its pre-trial order based thereon; the respective parties, Ruby M. Brown and Federal Deposit Insurance Corporation having respectively offered evidence upon the issues of this case as made up by the pleadings and the pre-trial order, and both parties having rested and having submitted the case to the court for decision and the court being fully advised in the premises hereby makes its,

FINDINGS OF FACT

I.

Plaintiff is a resident of the state of Oregon, the defendant, New York Life Insurance Company is a corporation organized and existing under and by virtue of the laws of the state of New York, and is



licensed to engage in the life insurance business in the state of Oregon. The Harney County National Bank of Burns, Burns, Oregon, is a national banking association organized and existing under the laws of the United States. The defendant, Federal Deposit Insurance Corporation is a corporation organized and existing by virtue of the laws of the United States.

## II.

The amount in controversy exceeds, exclusive of interest and costs, [70] the sum of \$3,000.00.

## III.

On November 27, 1935 the New York Life Insurance Company in consideration of the payment of the premiums therein specified, issued its policies of life insurance on the life of Edward N. Brown, in which policies the plaintiff Ruby M. Brown was made his beneficiary. Said policies were numbered #12748022 and #12748023 respectively, and by the terms of each of them the insurance company agreed to pay to Ruby M. Brown the sum of \$10,000.00 upon the receipt of proof of the death of Edward N. Brown.

## IV.

The defendant, Edward N. Brown, died by his own hand on or about August 6, 1942, and due proof of his death was thereafter furnished to and received by the insurance company, and by reason thereof there became due and payable under said policies the total sum of \$20,582.00, being \$10,327.00

on policy #12748022 and the sum of \$10,255.00 on policy #12748023.

#### V.

On or about August 18, 1942, the insurance company issued, and on August 21, 1942, delivered to plaintiff two checks in the following amounts respectively \$10,327.00 and \$10,255.00, whereby it directed the United States National Bank of Portland, (Oregon) to pay to the order of the plaintiff the respective amounts thereon.

#### VI.

The plaintiff presented each of said checks for payment to said bank on September 4, 1942, but the bank refused to pay said checks and advised her that the insurance company had previously countermanded payment thereof.

#### VII.

Prior to September 4, 1942 when said checks were presented for payment the Federal Deposit Insurance Corporation notified the insurance company that it had information indicating that the money used in payment of premiums on the above entitled policies were funds of the Harney County National Bank of Burns, Burns, Oregon, and the Federal Deposit Insurance Corporation notified the insurance company that it would and it did claim the right to receive the proceeds of said policies of insurance; whereupon the insurance company stopped payment on the two checks above mentioned.

VIII.

The New York Life Insurance Company does not have or claim to have [71] any right or interest in the proceeds of said policies, and has tendered into the registry of this court the sum of \$20,582.00, being the whole amount of said proceeds, and by order of this court made and entered was allowed the sum of \$416.06 as and for its costs and reasonable attorney's fees, which said last named sum has been paid from the registry of said court to said insurance company.

XI.

There remains in the registry of this court the sum of \$20,165.94, which is the sum in controversy between the plaintiff and the defendant Federal Deposit Insurance Corporation.

X.

Edward N. Brown paid the premiums due on said policies of insurance by checks which were received at the Boise, Idaho office of the insurance company. The amounts of said checks and the date when the same were received by the insurance company and the premium payments made thereby upon the respective policies and the banks upon which they were drawn are as follows:

Policy No.	Date	Amount	Bank on which Drawn
#12748022	11/29/35	\$297.20	Harney County National Bank of Burns, Burns, Oregon.
	10/21/36	297.20	" " " "
	9/11/37	297.20	" " " "
	12/ 2/38	297.20	" " " "
	10/21/39	297.20	" " " "
	12/28/40	297.20	Source of payment unknown.



Policy No.	Date	Amount	Bank on which Drawn
#12748023	2/ 6/37	297.20	Harney County National Bank of Burns, Burns, Oregon.
	1/11/37	297.20	“ “ “ “
	11/ 3/37	297.20	“ “ “ “
	12/31/38	297.20	“ “ “ “
	10/21/40	310.40	“ “ “ “

## XI.

Each of the checks drawn by Edward N. Brown on the Harney County National Bank were honored and paid by said bank from its funds.

## XII.

At the time each of said checks were presented to and paid by Harney County National Bank Edward N. Brown had an apparent credit on the books of the bank in the account on which said checks were drawn of more than the amount of the checks. Said apparent balances on the dates hereinafter [972] set forth, which are the dates when the respective checks were presented to and paid by said bank were as follows:

Policy No.	Date	Account	Amount
#12748022	12/ 2/35	Personal account	\$ 349.56
	10/23/36	Special account	2,045.00
	9/14/37	Personal account	533.49
	12/ 5/38	Personal account	313.06
	10/24/39	Special account	366.78
#12748023	2/10/36	Special account	661.20
	1/13/37	Special account	1,872.20
	11/ 8/37	Personal account	544.44
	1/ 3/38	Personal account	309.81
	10/24/40	Personal account	3,191.35

These apparent credit balances consisted of the then remaining balances of actual deposits of cash

or checks made payable to Edward Brown or his order, or both.

XIII.

Edward N. Brown was continuously an employee of the Harney County National Bank of Burns, Burns, Oregon, from the year 1927 to the date of his death, and he occupied the following positions:

A. From 1927 to January 12, 1932 as Teller and in other capacities;

B. From January 12, 1932 to January 11, 1938 as Assistant Cashier;

C. From January 7, 1936 to August 6, 1942 as Director;

D. From January 11, 1938 to August 6, 1942 as Vice President.

XIV.

During the period of Brown's employment, and while he was an officer and director of said bank he embezzled and misappropriated approximately \$416,777.73 of its funds and properties.

XV.

From manipulations of customers' accounts alone Edward N. Brown's embezzlements and appropriations were as follows during each of the years hereinafter set forth; [73]

	Embezzlements
Prior to 1935 .....	\$ 5,869.29
In 1935 .....	12,893.21
In 1936 .....	3,031.52
In 1937 .....	17,996.84
In 1938 .....	40,982.14
In 1939 .....	93,203.44
In 1940 .....	39,780.33

	Embezzlements
In 1941 .....	- 489.99*
In 1942 .....	10,319.61
	<hr/>
Embezzlements from customers' accounts alone .....	\$223,586.39
	<hr/> <hr/>

\* Embezzlements \$93,272.41, but there were compensatory bookkeeping entries in connection with the above embezzlements of \$93,762.40.

These embezzlements and misappropriations from customers' accounts were accomplished by means of false entries, withheld deposits made by depositors, withheld payments made by borrowers, and by unauthorized or unlawful withdrawals from credits and accounts of depositors of the bank.

#### XVI.

Of the embezzlements and misappropriations described in Findings XIV and XV no part was ever repaid or otherwise made good to the bank. The directors of the bank were not aware of any wrongful acts, embezzlements or misappropriations and defalcations of Edward N. Brown, and of any breaches of trust or duty on his part toward the bank; and in authorizing and fixing his salary, and in paying the same and in authorizing him to draw and receive the same the directors acted without knowledge of his peculations and breaches of trust and duty.

#### XVII.

At all times concerned in this action the accounts of depositors of the Harney County National Bank of Burns, Oregon were insured by the Federal De-



posit Insurance Corporation in accordance with the provisions of the laws of the United States, and particularly of Title 12 U.S.C.A. Section 264.

### XVIII.

On or about August 29, 1942, Federal Deposit Insurance Corporation entered into an agreement with the Harney County National Bank to acquire, and did acquire, and ever since said date has been and is the owner of the assets of said bank including all contracts, rights, claims, demands and choses of action and causes whatsoever pending, causes of action and judgment, whether known or unknown, which Harney County National Bank owned, held or had or owns or has against any person whomsoever including among other things all those which said bank had or has against any of its officers, [74] directors, or employees, or their sureties arising out of any action of any such persons in respect to the bank or its property, or arising out of the non-performance or manner of performance of their duties, together with any claims against any person for money or property of the bank or for damages that the bank may have had or owned.

### XIX.

At all times when Harney County National Bank honored and paid the several checks drawn by Edward N. Brown against it in payment of insurance premiums on the policies of insurance involved in this case, Edward N. Brown was indebted to the bank by reason of his misappropriations, embezzle-

ments and defalcations in amounts vastly in excess of any credits to his various accounts by reason of deposits or otherwise.

### XX.

All premiums paid on policy #12748022, with the exception of the premium of \$297.20 paid December 28, 1940 were paid by funds of and belonging to Harney County National Bank of Burns, Burns, Oregon, and no part of the same were paid from funds or credits belonging to Edward N. Brown.

### XXI.

That all premiums paid on policy No. 12748023 were paid with funds of and belonging to Harney County National Bank of Burns, Burns, Oregon, and no part of the same were paid from funds or credits belonging to Edward N. Brown.

### XXII.

All premiums on policy #12748022 were paid from funds and property of the Harney County National Bank of Burns, Burns, Oregon, except one premium of \$297.20 paid to the insurance company on December 28, 1940, the source of which latter payment was not proved nor traced by either plaintiff or defendant.

From the foregoing Findings of Fact the court has reached and does make the following,—

## CONCLUSIONS OF LAW

### I.

That all premiums paid on policy #12748022, with the exception of the premium payment of \$297.20

paid December 28, 1940, were paid from funds and property of Harney County National Bank of Burns, Burns, Oregon, [75] and were not paid by or with funds or credits belonging to Edward N. Brown.

## II.

That all premiums paid on policy #12748023 were paid from funds and property of Harney County National Bank of Burns, Burns, Oregon, and no part of the same were paid with any credits, funds or property of Edward N. Brown.

## III.

All premiums on policy #12748022 were paid from funds and property of the Harney County National Bank of Burns, Burns, Oregon except one premium of \$297.20 paid to the insurance company on December 28, 1940, the source of which latter payment was not proved nor traced by either plaintiff or defendant.

## IV.

That by reason of the wrongful use by Edward N. Brown of property, assets and funds of Harney County National Bank of Burns, Burns, Oregon, in paying the premiums on policy No. 12748023 a constructive trust arose in favor of Harney County National Bank of Burns, Burns, Oregon, and in favor of its assignee Federal Deposit Insurance Corporation, and for the full amount of the proceeds of said policy.

## V.

That by reason of the wrongful and unlawful use by Edward N. Brown of the assets and property of



Harney County National Bank of Burns, Burns, Oregon, in paying all the premiums on Policy No. 12748022, with the exception of the premium of \$297.20 paid on December 28, 1940, a constructive trust arose in favor of the bank, and in favor of defendant Federal Deposit Insurance Corporation as assignee of said bank for that proportion of the proceeds of said policy that the amount of the premiums paid from the bank's funds bears to the total amount of the premiums paid on said policy.

#### VI.

That Federal Deposit Insurance Corporation, as assignee of Harney County National Bank of Burns, Burns, Oregon, is the owner of and entitled to judgment for the whole amount of the proceeds of policy No. 12748023, namely \$10,255.00, less one-half the amount of the allowance of \$416.06 paid to New York Life Insurance Company for costs and attorneys' fees herein to-wit, \$10,046.97, and for an order to the clerk of this court [76] directing him to pay said sum to Federal Deposit Insurance Corporation from the funds in the registry of this court.

#### VII.

That Federal Deposit Insurance Corporation, as assignee of Harney County National Bank of Burns, Burns, Oregon, is the owner of and entitled to judgment for five-sixths of the amount of the proceeds of Policy No. 12748022, namely, five-sixth of \$10,327.00, less one-half of the amount of the allowance of \$416.06 paid to New York Life Insurance Company for costs and attorneys' fees herein, to-wit, five-sixth of \$10,118.97, or \$8,432.45, and for an

order to the clerk of this court directing him to pay said sum to Federal Deposit Insurance Corporation from the funds of the registry of this court.

### VIII.

That defendant Federal Deposit Insurance Corporation is entitled to have and recover said costs and disbursements from the balance of funds deposited in the registry of this court by New York Life Insurance Company, and for an order directed to the clerk of this court to pay the same to said corporation from the balance of the proceeds of said policies in his hands so far as the same may be sufficient to satisfy said costs and disbursements.

### X.

That plaintiff Ruby M. Brown is the owner of one-sixth of the proceeds of Policy No. 12748022, namely, one-sixth of \$10,327.00, less one-half of the amount of the allowances of \$416.06 paid to New York Life Insurance Company for costs and disbursements, to-wit, one-sixth of \$10,118.97, or \$1,686.49, and less the further amount of such costs and disbursements of Federal Deposit Insurance Corporation as may be allowed and taxed herein, and for an order directing the clerk of this court to pay the same to the plaintiff from the amount of the funds deposited by New Your Life Insurance Company to the registry of this court.

Done in open court this 20th day of November, 1944.

/s/ JAMES ALGER FEE

Judge

State of Oregon,  
County of Multnomah—ss.

Service of the foregoing Findings of Fact and Conclusions of Law by copy, as prescribed by law is hereby admitted, at Portland, Oregon this . . . . day of June, 1944.

/s/ JAMES C. DEZENDORF  
Attorney for Plaintiff

[Endorsed]: Filed Nov. 20, 1944. [77]

---

In the District Court of the United States  
for the District of Oregon

Civil No. 1412

RUBY M. BROWN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
Defendant,

FEDERAL DEPOSIT INSURANCE CORPORA-  
TION,

Inter-pleaded Defendant.

### JUDGMENT ORDER

The court having heretofore and made and entered its Findings of Facts and Conclusions of law herein that the defendant, Federal Deposit Insurance Corporation, having moved the court for an order of judgment and decree based on said findings



and conclusions, the court being advised of the premises,—

It Is Hereby Ordered, Adjudged And Decreed as follows:

1. That the Federal Deposit Insurance Corporation have and recover all of the proceeds of policy No. 12748023 being the sum of \$10,255.00 less one-half the amount of \$416.06 costs and disbursements allowed and paid to the New York Life Insurance Company, to-wit the sum of \$10,046.97.

2. That the Federal Deposit Insurance Corporation have and recover a sum equal to five-sixths of the proceeds of policy No. 12748022, being five-sixths of the sum of \$10,327.00 less one-half of the sum of \$416.06 paid to the New York Life Insurance Company for costs and disbursements, to-wit the sum of \$8432.45, being five-sixths of \$10,118.97.

3. That the Federal Deposit Insurance Corporation have and recover from the plaintiff, Ruby M. Brown, its costs and disbursements herein incurred and taxed at . . . . dollars.

4. That the clerk of this court be and he is hereby ordered and directed to pay to the Federal Deposit Insurance Corporation from the registry of this court the sum of \$10,046.97, the further sum of \$8432.45 and the amount of defendant Federal Deposit Insurance Corporation's costs and disbursements taxed at . . . . dollars.

5. The plaintiff have and recover the balance of said funds paid in by the New York Life Insurance Company after the payments therefrom of the sums

ordered and adjudged to be paid to the Federal Deposit Insurance Corporation. [78]

Done in open court this 20th day of November, 1944.

/s/ JAMES ALGER FEE  
Judge

[Endorsed]: Filed Nov. 20, 1944. [79]

---

[Title of District Court and Cause.]

MOTION TO AMEND PRE-TRIAL ORDER  
AND FOR A NEW TRIAL.

Comes now plaintiff and moves the court for an order (1) setting aside the findings of fact, conclusions of law and judgment heretofore entered herein on November 20, 1944, (2) amending the pretrial order so as to permit Plaintiff to deny Paragraph B, on Page 11-a thereof, and (3) directing a trial on the issue raised by Paragraph B and Plaintiff's denial thereof.

This motion is based upon the Affidavit of James C. Dezendorf, one of Plaintiff's attorneys, which is attached hereto and upon the following grounds:

(a) In Paragraph B, on Page 11-a of the Pre-trial Order, there is set forth the shortage claimed by F.D.I.C. as against Edward N. Brown in each year from 1935 through 1942. The facts, as claimed by F.D.I.C. in this paragraph, were not conceded by Plaintiff but it was admitted that F.D.I.C. could produce evidence to support the facts as alleged.

(b) At the time of the pretrial and of the settlement of the Pretrial Order, Plaintiff had not made any audit of the records of the Harney County National Bank and her financial condition was such that no complete audit could have been made.

(c) In connection with the suit brought by F.D.I.-C. against the Edward N. Brown Estate, pending in this court, Civil No. 2329, an audit has been made of such records of the Harney County National Bank of Burns, Oregon, as have been produced by F.D.I.C., (although it has been impossible to make a complete audit because of the absence of requisite information and records which have been requested) and, after the decision herein was announced, on June 12, 1944, it was discovered by the auditor for the Estate of Edward N. Brown, deceased, and was [80] reported to Plaintiff herein and it now appears probable that Edward N. Brown was not indebted to the Bank by reason of alleged embezzlements and misappropriations during the years 1935, 1936, 1937, 1938 and perhaps in the subsequent years, except 1942.

(d) If, in fact, Edward N. Brown was not indebted to the Bank during the years 1935, 1936, 1937, 1938 and in the subsequent years, except 1942, under the decision announced herein Plaintiff would receive the benefit of all premium payments prior to 1942 and the final result would be entirely different.

(e) In addition, the incomplete audit which has been made indicates that the Bank's records actually reflect many of the deposits and withdrawals in depositors' accounts which are claimed by F.D.I.C. to



have been withheld, so that, in fact, they actually were received and went through the Bank's records.

/s/ HAMPSON, KOERNER,  
YOUNG & SWETT  
JAMES C. DEZENDORF  
Attorneys for Plaintiff,

[Endorsed]: Filed Nov. 28, 1944. [81]

---

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. DEZENDORF

State of Oregon

County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say that I am one of the attorneys for Plaintiff herein; that at the time of the pretrial conference herein and at the time of the settlement of the Pretrial Order Plaintiff had not made an audit of the records of the Harney County National Bank of Burns, Oregon, for the purpose of verifying the facts as claimed by F.D.I.C. with respect to the alleged shortage of Edward N. Brown during the years 1935 to 1942. In connection with the action by F.D.I.C. against the Edward N. Brown Estate an audit has been made of such records of the Harney County National Bank of Burns, Oregon, as have been produced by F.D.I.C. and, after the decision was announced herein on June 12, 1942, the auditor reported to me that from the audit which he had made it appeared probable that Edward N. Brown was not, in fact, indebted to

the Bank by reason of alleged embezzlements and misappropriations during the years 1935, 1936, 1937, 1938 and perhaps in the subsequent years, except 1942. The auditor for the Estate also reported to me that his examination of the Bank's records disclosed that they actually reflect many of the deposits and withdrawals in depositors' accounts which F.D.I.C. claimed were withheld, so that the funds represented by the so-called withheld items were actually received by and went through the records of the Bank.

That if the auditor's statements, as above set forth, are true the result herein, upon the basis of the court's opinion, will be entirely different and plaintiff will receive the benefit of all premium payments prior to 1942.

/s/ JAMES C. DEZENDORF [82]

Subscribed and sworn to before me this 28th day of November, 1944.

[Seal] /s/ DOROTHY THAIN

Notary Public for Oregon

My commission expires Dec. 20, 1944.

State of Oregon,  
County of Multnomah—ss.

Service of the foregoing Motion to Amend Pre-trial Order and For a New Trial by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 28th day of November, 1944.

/s/ MAGUIRE, SHIELDS &  
MORRISON.

Of Attorneys for F.D.I.C.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND PRETRIAL ORDER AND FOR A NEW TRIAL

Comes now Federal Deposit Insurance Corporation and files its objections to motion made by the plaintiff for an order setting aside the findings of fact and conclusions of law judgment heretofore entered on November 20, 1944, and to amend the pretrial order to permit plaintiff to deny Paragraph B, on page 11-A thereof and for an order directing a trial on the issues raised by Paragraph B and plaintiff's denial thereof upon the following grounds and reasons:

1. That said motion is not timely;
2. That the affidavit supporting said motion is insufficient in law and fact and purely hearsay, not made by any person having any knowledge of the facts and that the plaintiff is estopped to have or receive the relief prayed for therein.

In support hereof the defendant Federal Deposit Insurance Corporation submits the affidavit of Robert F. Maguire, one of its attorneys, attached hereto.

/s/ MAGUIRE, SHIELDS &  
MORRISON

Attorneys for Federal Deposit Insurance Corporation



State of Oregon.

County of Multnomah—ss.

I, Robert F. Maguire, being first duly sworn on oath, depose and say that I am one of counsel for Federal Deposit Insurance Corporation in the case of Ruby M. Brown vs. New York Life Insurance Company and Federal Deposit Insurance Corporation. That at the time the said case came on for trial the Federal Deposit Insurance Corporation had in attendance on the trial its examiner Fossum, who had charge of the complete audit of the books, records and affairs of the Harney County National Bank and the duty of ascertaining the amounts and extent of the [84] misappropriations and defalcations of Edward N. Brown of the funds, assets and properties of that Bank. That Fossum was intimately familiar with the means and methods whereby the said Edward N. Brown accomplished the misappropriations and defalcations which made up the items and the amounts claimed by the Federal Deposit Insurance Corporation and was prepared to and would have testified in detail with regard to each of said items which make up the various sums set forth in Paragraph B, page 11-A at the pretrial order; that the audit examination of the books and records of the Bank and its affairs included examination and audit of passbooks, check stubs, and supporting data of the Bank's customers relating to their several respective transactions with the Bank as to which misappropriations and defalcations were alleged; that the defendant Federal Deposit Insurance Corporation was then prepared,

ready, able and willing to have offered detailed proof of each of said items, but plaintiff although not admitting the amount of said misappropriations and defalcations admitted that the Federal Deposit Insurance Corporation could produce evidence to substantiate the same.

At the request of the administrators of the estate of Edward N. Brown, deceased, and in connection with the action brought in this court by the Federal Deposit Insurance Corporation against said administrators the defendant Federal Deposit Insurance Corporation had transported to affiant's office in Portland, Oregon, the Bank's books and records which were so voluminous their weight was approximately one ton; that all these records were made available to the auditor of the administrator who spent several weeks in examining them.

That during the latter part of said auditor's examination he informed the affiant that he had discovered that in a number of instances deposits alleged to have been made by the customers which were the basis of claims of misappropriations by Edward N. Brown had been reflected in "The Savings Ledger" and further stated that while he did not doubt there was an explanation as to why misappropriation was claimed with respect to this he personally did not know the explanation and requested affiant to ascertain the facts relative thereto.

As an example he cited the case of F. Jeneskie. Affiant thereupon communicated with Federal Deposit Insurance Corporation and ascertained that

Mr. Fossum was then detailed to an investigation in one of the New England states and that as soon as he could be released therefrom and [85] returned to the general office of the corporation in Chicago, Illinois, where his records were available, he would make an analysis and that the result thereof would be communicated to affiant. Unfortunately, however, before Mr. Fossum could return to Chicago he was taken seriously ill and only within recent days has been able to resume work.

Affiant is informed by Federal Deposit Insurance Corporation and verily believes and alleges that the facts with regard to these instances where withheld deposits appear to have been credited to the so-called "Savings Ledger" are as follows:

That the so-called "Savings Ledger" is misnomer, that it is in fact merely a daily journal used solely for trial balance purposes; that it was the practice of the said Edward N. Brown in many instances to credit the amount of the deposit upon the depositor's passbook, to make entries thereof on the so-called "Savings Ledger", which was actually a daily savings journal, but not to make corresponding entries in the individual ledger sheets, that he would then withhold the deposit and convert it to his own use and reconcile the trial balance by means of debit memos which were destroyed when they had served their purposes of reconciliation of the trial balance with the actual balance; said debit memos were false and fictitious, and were used solely for the purpose of concealing his misappropriations and embezzlements; but that in each of



these instances no credits were passed into or entered upon the individual savings ledger of the customer.

That the entries made on the so-called "Savings Ledger" or daily savings journal cannot be reconciled with the individual depositor's ledger sheets due to the fact that where deposits were withheld by Brown no corresponding entries were made on the latter. That in the case of the Jeneskie account, the customer's passbook disclosed the proper entries, which were in a large part of these supported by cancelled checks issued to the depositor by the Hines Lumber Company; that in truth and in practice said Edward N. Brown misappropriated and embezzled each of the items making up the amounts set forth in the pretrial order referred to in the motion for new trial, and alleged by the defendant to have been misappropriated and embezzled by him, and the amounts thereof were at least as large as the amounts set forth in the pretrial order, and in the Exhibits offered by the Federal Deposit Insurance Corporation at the trial for each of the years, 1935, 1936, 1937, 1938, 1939, 1940, 1941 and 1942. [86]

/s/ ROBERT F. MAGUIRE

Subscribed and sworn to before me this 5th day of December, 1944.

[Seal] /s/ MARION HUGGINS

Notary Public for Oregon

My commission expires: 3-18-47.

State of Oregon,  
County of Multnomah—ss.

Service of the foregoing Affidavit by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 5th day of December, 1944.

/s/ JAMES C. DEZENDORF  
Attorney for plaintiff

[Endorsed]: Filed Dec. 5, 1944. [87]

---

[Title of District Court and Cause.]

ORDER DENYING PLAINTIFF'S MOTION  
FOR NEW TRIAL AND TO AMEND THE  
PRETRIAL ORDER

This matter having come on for hearing on January 8, 1945 upon plaintiff's motion for a new trial and to amend the pretrial order, and the plaintiff appearing by Mr. James C. Dezendorf of her counsel, and the defendant, Federal Deposit Insurance Corporation appearing by Robert F. Maguire of its counsel, and the court having heard counsel and being advised of the premises, and having in open court denied said motions and each of them—

It Is Hereby Ordered and Adjudged that plaintiff's motions for a new trial and to amend the pretrial order herein is hereby denied.

Done this 31st day of January, 1945 as of January 8, 1945, the latter being the date on which said motions were denied.

/s/ JAMES ALGER FEE  
District Judge.

[Endorsed]: Filed Jan. 31, 1945. [88]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Plaintiff above named, Ruby M. Brown, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from (1) the Judgment Order entered in this action on November 20, 1944, and (2) the order denying Plaintiff's Motion to Amend Pretrial Order and for a New Trial entered in this action on January 8, 1945.

HAMPSON, KOERNER,  
YOUNG & SWETT

Signed: JAMES C. DEZENDORF  
Attorneys for Appellant,  
Ruby M. Brown

State of Oregon,  
County of Multnomah—ss.

Service of the foregoing Notice of Appeal by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 13th day February, 1945.

.....  
Of Attorneys for Inter-  
pleaded Defendant.

[Endorsed]: Filed Feb. 13, 1945. [89]



## DEFENDANT'S PRE-TRIAL EXHIBIT No. 34

## Shortages by Years

Year	Restitutions	Omitted Credits and Improper Debits	Net Shortage
Prior to 1935.....	\$ 1,112.01	\$ 6,981.26	\$ 5,869.25
1935 .....	9,173.32	22,066.53	12,893.21
1936 .....	24,283.76	27,315.28	3,031.52
1937 .....	10,818.23	28,715.07	17,996.84
1938 .....	7,521.58	48,503.72	40,982.14
1939 .....	47,084.38	140,287.82	93,203.44
1940 .....	56,879.87	96,660.20	39,780.33
1941 .....	93,762.40	93,272.41	489.99
1942 .....	33,002.87	43,322.48	10,319.61
		Total.....	\$223,586.35

The above figures do not include the interest adjustments made by Federal Deposit Insurance Corporation, nor the majority of adjustments made by the National Bank Examiners.

## PLAINTIFF'S PRETRIAL EXHIBIT No. 39

## Federal Deposit Insurance Corporation

## Certified Copy of Resolution of Board of Directors

I, E. F. Downey, Secretary to the Board of Directors of the Federal Deposit Insurance Corporation, do hereby certify that the attached is a true and correct copy of a resolution duly adopted at a meeting of the Board of Directors of said Corporation, regularly called and held on the 1st day of September, 1942, at which a quorum was present, and that the same has not been amended or rescinded and is now in full force and effect.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Corporation to

be affixed hereto, in the City of Washington and District of Columbia, this 1st day of September, 1942.

(Signed) E. F. DOWNEY

Secretary to the Board of Directors of the Federal  
Deposit Insurance Corporation

### RESOLUTION

Whereas, The Harney County National Bank of Burns, Burns, Oregon, an insured national banking association (hereinafter referred to as the "Selling Bank") proposes to sell certain of its assets to The United States National Bank of Portland, Portland, Oregon, an insured bank, (hereinafter referred to as the "Purchasing Bank") in consideration of the assumption by the Purchasing Bank of the liabilities of the Selling Bank to its depositors as shown by its books as of the close of business on the date on which the proposed sale of assets and assumption of deposit liabilities is consummated; and

Whereas, The Selling Bank has various investments which are now carried on its books at more than their present actual cash value, and has sustained losses which have substantially impaired its reserves, surplus and capital, and it is unsafe for the Selling Bank to continue in the banking business; and

Whereas, the Selling Bank has applied to and requested that this Corporation, (a) purchase all of its assets not considered of sound banking quality and not acceptable for acquisition by the Purchasing Bank, and/or (b) make a loan to the Selling

Bank upon the security of the aforesaid assets, pursuant to the provision of paragraph (4) of subsection (n) of Section 264 of Title 12, U.S.C., as amended; and

Whereas, It appears that unless the aforesaid liabilities of the Selling Bank are assumed by the Purchasing Bank through aid extended by this Corporation as provided in paragraph (4) of subsection (n) of Section 264 of Title 12, U.S.C., as amended, it will probable be necessary that the Comptroller of the Currency of the United States close the Selling Bank on account of inability to meet the demands of its depositors; and

Whereas, It is the judgment of this Board that this Corporation would sustain greater losses in the event of the closing of the Selling Bank and the liquidation of its assets in receivership than in the event of its extending aid to the Selling Bank as hereinafter provided; and

Whereas, This Board has determined to extend aid to the Selling Bank in the form of a purchase of assets and that the proposed purchase will reduce the risk and avert threatened losses to this Corporation and will make possible the consummation of the aforesaid assumption of the aforesaid liabilities of the Selling Bank by the Purchasing Bank;

Now, Therefore, Be It Resolved, That this Corporation purchase from the Selling Bank all of its assets not considered of sound banking quality and not acceptable for acquisition by the Purchasing



Bank, subject to each and all of the following conditions:

1. The proposed assumption of the deposit liabilities of the Selling Bank by the Purchasing Bank in consideration of the transfer and sale to the Purchasing Bank of certain assets of the Selling Bank having an agreed value equal to the amount of the deposit liabilities assumed by the Purchasing Bank shall be consummated concurrently with the aforesaid sale to this Corporation.

2. The exact amount of the purchase price to be paid by this Corporation to the Selling Bank shall equal the difference between the agreed value of the assets classified as acceptable for acquisition by the Purchasing Bank and the amount of the deposit liabilities of the Selling Bank as shown by its books as of the close of business on the date the proposed sale to this Corporation is consummated and shall be based upon the amount necessary to make possible the aforesaid assumption of the deposit liabilities of the Selling Bank by the Purchasing Bank as determined by authorized representatives of this Corporation at the time of the consummation of said sales; provided that the amount of the purchase price to be paid for the assets acquired by this Corporation from the Selling Bank shall not exceed One Million Two Hundred Fifty Thousand (\$1,250,000) Dollars.

3. The Selling Bank shall execute a contract embodying the terms of the sale to this Corporation (supported by such exhibits as may be required by

counsel for this Corporation) which shall provide in substance for the transfer to this Corporation of absolute title to the property sold free and clear of any liens or encumbrances or any reserved right, title or interest of any kind or character in favor of the Selling Bank and for the payment of a further contingent purchase price (over and above the initial cash purchase price determined as hereinbefore provided) equal to the amount of the recoveries realized by the Corporation through the liquidation of the property acquired from the Selling Bank in excess of the initial cash purchase price, the costs of liquidation of the property acquired from the Selling Bank in excess of the initial cash purchase price, the costs of liquidation and a service charge or fee equal to four per cent (4%) per annum of the unrecovered portion of the initial cash purchase price and the costs of liquidation.

4. The assets to be acquired by this Corporation by purchase shall consist of all the unacceptable assets of the Selling Bank, including its non-book assets.

5. The proposed purchase transaction shall be duly assented to by the Comptroller of the Currency, the directors of the Selling Bank and of the Purchasing Bank, and by the holders of two-thirds of the voting rights of the outstanding stock of the Selling Bank, and all contracts, conveyances, transfers, assignments, and other documents and all corporate proceedings necessary or proper for the consummation of all phases of the transactions pro-

posed herein and the protection of the Corporation shall conform to the requirements of counsel for this Corporation.

6. Any fees or charges billed to the Selling Bank for services of accountants, attorneys or other specialists in connection with any matters handled on behalf of the Selling Bank at any time prior to disbursement of the amount of the purchase prices to be paid by this Corporation in connection with any phase of the purchase and sale transactions, herein described and referred to, shall be submitted to representatives of this Corporation prior to payment, and no such fees or charges shall be paid in excess of such amounts as may be approved as reasonable by representatives of this Corporation.

7. The Purchasing Bank shall enter into an agreement in form required by this Corporation providing for the furnishing of such facilities and the performance of such services as may be required by this Corporation, without expense to this Corporation save and except out-of-pocket expenses incurred in connection with the liquidation of the assets purchased by this Corporation.

8. This Corporation shall be furnished with suitable assurance that the management of the Purchasing Bank is satisfactory; such assurance to be through approval by the Comptroller of the Currency, or otherwise as the Chairman of this Corporation may determine.

9. The commitment of this Corporation herein set forth shall forthwith expire:



(a) If the Selling Bank shall cease to be an operating institution under the management of its Board of Directors prior to the disbursement of the purchase prices to be paid to it by this Corporation as hereinabove provided.

(b) If all phases of the proposed transaction between the Purchasing Bank and the Selling Bank and this Corporation, hereinabove provided for, shall not have been completed within ninety (90) days from date.

10. Such other and further conditions as may be required by the Chairman of the Board of Directors of this Corporation.

Further Resolved, That prior to the actual disbursement of the initial cash purchase price to be paid by this Corporation as hereinbefore provided, there shall be no agreement or obligation on the part of this Corporation to purchase any property from the Selling Bank.

Further Resolved, That W. G. Loeffler, Fiscal Agent for this Corporation, be and he is hereby authorized and directed upon receipt by him of satisfactory evidence that all of the conditions hereinabove set forth have been fulfilled, to disburse from funds now deposited to the credit of the Corporation with the Treasury of the United States, an amount equal to the initial cash purchase price certified by the authorized representatives of this Corporation to be necessary to make possible the assumption of the deposit liabilities of the Selling Bank by the Purchasing Bank; provided that the

amount so disbursed shall not exceed the sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000).

Further Resolved, That W. G. Loeffler, Fiscal Agent, be and he is hereby authorized and directed to issue and deliver to the Acting Chief of the Division of Liquidation, the Supervising Liquidator, or the Acting Supervising Liquidator, a check in the amount of Five Thousand (\$5000) Dollars payable to the order of the Purchasing Bank for credit to the account of the Corporation which shall be deposited in the Purchasing Bank to be used as an Imprest Fund for the completion of this transaction and for the liquidation of the assets; and that as vouchers are submitted from time to time showing the proper disbursement of any portion of said funds, said Fiscal Agent be and he is directed to disburse such further sums as shall be necessary to maintain at all times a balance of \$5,000 in such Imprest Fund.

Further Resolved, That withdrawals from such account may be made on the signature of a designated Examiner in Charge of completion of the purchase transaction, Liquidator or Assistant Liquidator in Charge of the liquidation of the purchased assets; and that the Chief or Acting Chief of the Division of Liquidation or Supervising Liquidator or Acting Supervising Liquidator of this Corporation may designate the Examiner in Charge, Liquidator or Assistant Liquidator for the purpose of making such withdrawals.

Further Resolved, That the Chairman of the Board of Directors of this Corporation or such person or persons as he may designate, be and they are hereby authorized to execute for and on behalf of this Corporation such instruments as may be necessary or proper to carry out the terms of this resolution.

Further Resolved, That the Chairman of the Board of Directors of this Corporation be and he is hereby authorized to amend or waive any of the conditions of this resolution provided such amendment or waiver is, in his judgment, consistent with the best interest of this Corporation.

Further Resolved, That if it shall appear desirable to the Corporation to make a loan or loans to the Selling Bank under the provisions of paragraph (4) of subsection (n) of Section 264 of Title 12, U.S.C., as amended, to be secured by any or all of such unacceptable assets instead of purchasing such unacceptable assets as hereinabove provided, such loan or loans to the Selling Bank, in an amount not to exceed the initial cash purchase price hereinabove provided for may be made and consummated on such terms and conditions as shall be required and prescribed by counsel for the Corporation, and the amount of such loan or loans shall be disbursed as hereinbefore provided with respect to the initial cash purchase prices provided that the aggregate amount to be disbursed by the Corporation either by way of purchase price or loan or loans shall not exceed the amount of the commitment set forth in condition No. 2 hereof.



## PLAINTIFF'S PRETRIAL EXHIBIT No. 40

This Agreement, made and entered into this 29th day of August, 1942, by and between the Harney County National Bank of Burns, a national banking association duly organized and existing under and by virtue of the laws of the United States, with its principal office in Burns, Oregon (hereinafter referred to as the "Bank"), and the Federal Deposit Insurance Corporation, a corporation created and existing under and by virtue of an act of the Congress of the United States, having its principal office in the City of Washington, District of Columbia, (hereinafter referred to as the "Corporation"):

## Witnesseth:

Whereas, the Bank has various investments which are now carried on its books at more than their present actual value and has sustained losses which have wholly exhausted and wiped out its reserves, surplus and capital, and it is unsafe for the Bank to continue in the banking business without new or additional capital and the Bank desires to protect its depositors against losses which would be sustained in the event of forced liquidation of its investment; and

Whereas, the Bank proposes to sell certain of its assets to The United States National Bank of Portland, a national banking association duly organized and existing under and by virtue of the laws of the United States with its principal office in Portland, Oregon, in consideration of the assumption of the

deposit liabilities of the Bank as shown by the Bank's books as of the close of business on the date hereof; and

Whereas, the Bank has filed an application *re-*  
*question* the Federal Deposit Insurance Corpora-  
tion to purchase certain assets of the Bank and/or  
to loan money on the security of said assets in order  
to facilitate and make possible the proposed sale of  
assets to, and the aforesaid assumption of the de-  
posit liabilities by the United States National Bank  
of Portland; and

Whereas, the Board of Directors of the Federal  
Deposit Insurance Corporation has determined that  
the Federal Deposit Insurance Corporation will not  
make a loan to the bank but will purchase, on cer-  
tain terms and conditions, all of the assets of the  
Bank not purchased and acquired by The United  
States National Bank of Portland, as aforesaid,  
and has concluded that such purchase of assets by  
the Federal Deposit Insurance Corporation will re-  
duce a risk and avert a threatened loss to the Fed-  
eral Deposit Insurance Corporation; and

Whereas, the Initial Cash Purchase Price (as de-  
fined in Section 12 hereof) to be paid by the Fed-  
eral Deposit Insurance Corporation for such assets  
together with certain other assets of the bank (con-  
sisting of cash, high-grade securities, and other as-  
sets considered to be of sound banking quality and  
acceptable for acquisition by The United States  
National Bank of Portland) will equal the aggre-  
gate amount of the deposit liabilities of the Bank as

shown by its books of account as of the close of business on the date hereof; and

Now, Therefore, each of the parties hereto intending to be legally bound hereby, do severally undertake, promise, covenant, and agree each with the other, and the Bank does hereby represent, warrant, covenant and agree to and with the Federal Deposit Insurance Corporation, as follows:

1. The Bank hereby acknowledges that it filed an application requesting the Federal Deposit Insurance Corporation to purchase certain assets of the Bank and/or to loan money on the security of said assets and that it has been determined by the Federal Deposit Insurance Corporation that it will not make a loan to the Bank but will purchase certain assets of the Bank instead.

2. The Bank hereby warrants that at the close of its Business on the date hereof (Immediately prior to execution and delivery of this instrument) the assets of the Bank consist of two classes:

(a) The first class of "acceptable assets" consists of each, deposits in other banks and certain investments of the Bank of sound banking quality (With adjustments for accrued interest and unearned discount) which are being sold, transferred, assigned, and conveyed to The United States National Bank of Portland at agreed values under the terms of a contract bearing even date herewith.

(b) The second class or "unacceptable assets", consists of every other asset and all other property of the Bank.



Exhibit "A" hereto shows as at the close of its business on the date hereof (Immediately prior to the execution and delivery of this instrument), the total assets and liabilities of the Bank as shown by its books of account, the total acceptable assets of the Bank (shown in the column headed "acceptable assets") and the total unacceptable assets of the Bank as shown by the books of the Bank (shown in the column headed "unacceptable assets"), but does not show assets of the Bank which do not appear on its books and which for the purposes hereof are included in classification of "unacceptable assets". Such exhibit identifies the several classes of assets only through the totals in the central accounts in the general ledger of the Bank, and for a more particular description of the individual items comprising these totals. Reference is made to the books of account and supporting records and files of the Bank, on which the detail of such items will appear.

3. The Bank does hereby sell, grant, convey, assign, transfer and set over to the Corporation, all of its property other than:

(a) The "acceptable assets" of the Bank shown in Exhibit "A" hereto, and records pertaining thereto;

(b) The property held by the Bank as bailee or as fiduciary for other than itself, and the records pertaining to its activities as fiduciary;

(c) The records of the Bank pertaining to its deposit liabilities as shown upon its books immediately prior to the execution and delivery of this instrument.

Without any limitation on the generality of the foregoing, the property so sold, granted, conveyed, assigned, transferred and set over to the Corporation (hereinafter sometimes referred to as the "property sold"), shall expressly include, without being limited to, each and all of the following:

(1) All "unacceptable assets" of the Bank, shown in Exhibit "A" hereto.

(2) All assets of the Bank which are not carried on its books of account or which are carried on such books at a nominal amount for bookkeeping purposes.

(3) All property specifically listed on certain paper records known as "Line Sheets", heretofore jointly prepared by representatives of the Bank and the Corporation and now in the possession of the Corporation, each such Line Sheet being marked with the legend:

"The property described in the within memorandum has been and is hereby sold, granted, conveyed, assigned, transferred and set over to the Federal Deposit Insurance Corporation pursuant to the terms of a contract dated August 29, 1942.

THE HARNEY COUNTY

NATIONAL BANK OF BURNS

By .....

President/Cashier

Dated: Burns, Oregon, August 29, 1942."

(the property described on such Line Sheets being also more particularly described on the books of account or in the records of the Bank, to which reference is made for a more particular description thereof).

(4) All property of the Bank which heretofore had been specifically endorsed to the Corporation, or granted, conveyed, transferred or assigned to the Corporation by deeds or other written instruments of conveyance or transfer, specifically referring to the property conveyed or transferred, or delivered to its representatives, whether or not listed on such Line Sheets.

(5) All contracts, rights, claims, demands, chosen in action or causes whatsoever, pending causes of action, and judgments, whether known or unknown, which the Bank owns, holds or has against any person or persons whomsoever, including, without being limited to, any claims against its stockholders for payment of or by reason of ownership of its capital stock (neither the mention of the foregoing liability or the approval of this agreement by the Bank and/or its stockholders shall be deemed an admission by said Bank or stockholders of the existence of such liability) any claims against its directors, officers or employees or their sureties arising out of any act of any such persons in respect to the Bank or its property or arising out of the non-performance or manner of performance of their duties, any claims against any person for money or property of the Bank, or for damages, which the Bank may have or own.

(6) A non-negotiable demand promissory note bearing even date herewith in the sum of \$906,856.47 executed by the Bank in favor of the Corporation and secured by any property, assets, rights, claims or causes of action, which under the law, or for any other reason, are not assignable or transferable or



which the Corporation may consider to be non-assignable or non-transferable. In the event the Corporation receives any net excess recoveries as defined in Section 12 herein, then said note shall be forthwith cancelled by the Corporation and returned to the Bank or the liquidating agent or committee representing the interests of the stockholders of the Bank.

(7) All moneys, credits or other property of every kind or character acquired by the Bank as the result of its sale, collection or enforcement of any of the "property sold" which have not been applied or credited on the assets comprising the "property sold."

(8) All fees or commission due, or which shall hereafter become due to the Bank for any services performed by the Bank as fiduciary or in a fiduciary capacity.

(9) All books of account, records, correspondence files and credit files of the Bank pertaining to any of the "property sold."

4. Upon the completion of the Corporation of written schedule, now under preparation, containing a more particular description or inventory of such of the property sold as is known, the Bank agrees to identify the same by signature of its authorized agents in its behalf and affixation of its corporate seal. Such schedules shall be and become exhibits forming a part of this agreement, although not attached hereto. The omission of the Corporation to list any item of property sold in such schedules shall not be deemed to exclude such omitted item from the

sale, if otherwise included in the general description of the property sold.

5. The Bank warrants that it has heretofore delivered to the Corporation, all of the property sold which is capable of manual delivery, and has heretofore duly executed, acknowledged and delivered to the Corporation instruments of conveyance, assignment or transfer, or has made endorsements of each known item of property sold, in order to vest absolute title in the Corporation for each item of the property sold. The Bank covenants and agrees on behalf of itself, its successors, legal representatives and assigns, on request of the Corporation to execute such further instruments of conveyance, assignment or transfer, to make such endorsements, to make such deliveries and to give such further assurances as shall be necessary or proper to vest in or confirm to the Corporation whatever right, title and interest the Bank has on the date hereof in any of the property sold, which through inadvertence, by reason of lack of discovery or otherwise, may not heretofore have been effectively conveyed or transferred to the Corporation. The form and content of each such instrument of conveyance, assignment or transfer or of such endorsements and the manner of such deliveries, shall conform with the requirements of the Corporation and shall be so done as to vest in the Corporation the absolute and unqualified title in fee simple to all of the property sold.

6. Notwithstanding the form of any endorsement by the Bank to the Corporation of notes or other negotiable instruments the Bank expressly warrants

that each such instrument is genuine and in all respects what it purports to be; that it has good title to each such instrument; that all prior parties had capacity to contracts; that it has no knowledge of any fact which would impair the validity of the instrument or render it valueless and that the balance due on each such instrument is as shown by such instrument. The Bank agrees for itself, its successors, legal representatives or assigns, to enforce for the benefit of the Corporation, under the direction and at the expense of the latter, all rights or claims which the Bank may be entitled to enforce with respect thereto by reason of the facts or circumstances constituting a breach of such warranty, and to turn over to the Corporation all things of value realized by it as the result of any such action. The Bank further agrees to enforce or liquidate for the benefit of the Corporation and under the direction and at the expense of the latter, any rights, claims or other property which are included in the description of the property sold but which are not assignable or transferable for any reason, and any rights or claims which it may have under any covenants in any conveyances to the Bank of any real property sold by the Bank to the Corporation which cannot be enforced by the Corporation in its own name for any reason, and any other rights or claims, including but not being limited to general and special warranties of every kind and character, which are incident to the property sold but which cannot be enforced by the Corporation in its own name for any reason.



7. The Bank agrees to preserve and safely keep all of its files, books of account and records not included in the property sold to the Corporation or to The United States National Bank of Portland, for the joint benefit of itself and the Corporation and that it will permit the Corporation to inspect and make extracts from or copies of any of such files, books, or records at any reasonable time. None of such files, books, or records shall be destroyed until such time as the Corporation may consent in writing to the destruction thereof.

8. The agreed value of the acceptable assets as shown in exhibit "A" hereto, together with the sum of \$906,856.47 of the Initial Cash Purchase Price being paid for the property sold to the Corporation constituting the consideration initially received by the Bank hereunder, is intended to equal, but not exceed, the aggregate amount of the liabilities of the Bank to its depositors at the close of business on the date hereof, as shown in Exhibit "C." The Bank warrants Exhibit "C" to be true and correct; but if, through omissions, errors in bookkeeping, listing, computation or otherwise, the amount due to depositors of the Bank actually shall be less than the aggregate amount thereof as of the close of business on the date hereof shown in Exhibit "C", then the Bank authorizes and directs The United States National Bank of Portland to pay over to the Corporation the amount of such difference forthwith upon discovery thereof (such difference or payment to constitute a part of the prop-

erty sold by the Bank to the Corporation under this agreement).

9. The Bank hereby covenants and warrants that it has ceased to have any right, title or interest in or to any of the property sold to the Corporation, of any nature, legal or equitable, and that henceforth the Corporation shall have the absolute ownership of all of the property sold free and clear of all liens, encumbrances or claims, of any nature, legal or equitable, express or implied, and of all rights incident thereto. Neither this instrument nor any other instrument executed by the Bank in connection with the transaction singly or collectively, shall be construed to be a mortgage or mortgages or to create or continue any right in rem in the Bank with respect to any of the property sold to the Corporation. The Bank hereby expressly waives and relinquishes any and all purchase money liens granted or implied by law in its favor as seller of any of the property sold.

10. The Bank hereby irrevocably nominates, constitutes and appoints James N. Markham, Wheeler McDougal, Francis C. Brown and John L. Cecil, who are agents of the Corporation, or either or any of such persons, the true and lawful attorneys of the Bank, for it and in its name, place and stead, with full power of substitution and revocation, to sign, endorse or acknowledge any and all checks, drafts, bills of exchange, evidences of debt, stock powers, bills of sale, deeds, mortgages, assignments of mortgages, assignments of choses in action, indebtedness or other personal property, releases, or



other instruments in writing of like or different nature, as may be necessary or proper to convey or perfect title of the Corporation to all or any of the property sold or to effect the collection or liquidation thereof, to protect or preserve the same, or fully to enjoy the incidents of absolute ownership of the same.

11. In the event any action at law or in equity shall be instituted by any person against the Bank and the Corporation as co-defendants, the Bank agrees to join with the Corporation in a petition to remove the action to the United States District Court for the proper district, and hereby authorizes and appoints as its attorney for the purpose of effecting such removal, any attorney designated by the Corporation to act in that capacity. The Bank agrees to institute as party plaintiff, with or without joinder of the Corporation as co-plaintiff, any action with respect to any of the property sold, or any of the property intended to be sold under this agreement, or any matter connected therewith, whenever notice requiring such action shall be given by the Corporation to the Bank stating that in the opinion of counsel for the Corporation such action is requisite for the proper protection of the Corporation or the proper protection or enforcement, collection or liquidation of any of such property.

12. The Corporation agrees to and does hereby purchase from the Bank the property sold to is by the Bank for the sum of (a) \$906,856.47 in cash, to be paid upon the delivery and exchange of executed copies of this agreement, and (b) the amount of the



liability or liabilities, if any, of the Bank to any depositor or depositors for any reason act included and listed in Schedule "A" hereto, provided that the Corporation alone and in its sole and absolute discretion shall determine, and such determination by it shall be final, the amount of the liability or liabilities, if any, and the identity of the depositor or depositors of the Bank, if any, not so included and listed in said Schedule "A". The said cash payment of \$906,856.47 plus any payments under clause (b) of this section shall constitute the initial Cash Purchase Price to be paid by the Corporation to the Bank and the words, "Initial Cash Purchase Price", wherever elsewhere used in this agreement shall only include and have reference to the payments by the Corporation provided for in clauses (a) and (b) of this section, in addition to the Initial Cash Purchase Price and as part of the purchase price of the property sold to is by the bank, the Corporation agrees to pay a further sum, if any, which further sum is described, defined and limited as follows (and as so described defined and limited is hereafter called the "further sum"). The further sum shall be in the amount of the net recoveries, if any, received by the Corporation from the collection inforcement, liquidation, resale or operation of the property sold to it by the Bank in excess of:

(1) The amount of the initial cash purchase price to be paid by the Corporation to the Bank, as in this section first hereinbefore provided; and

(2) All costs of liquidation paid or incurred by

the Corporation in connection with the property sold; and

(3) A reasonable return to the Corporation on the aggregate amount which the Corporation from time to time has invested in the property sold, including, without being limited to: (a) the amount of the initial cash purchase price referred to in subdivision (1) of this section, and (b) all costs of liquidation referred to in subdivision (2) of this section, such return to be an amount equivalent to 4% per annum of the total unrecovered, unrealized or uncollected amount of such investment by the Corporation, after allowing for said recoveries effected by the Corporation from time to time, such recoveries to be applied and such reasonable return to be computed at such reasonable intervals as may be consistent with the prevailing accounting practices of the Corporation.

The term "costs of liquidation" as herein employed, shall include all sums expended or liabilities assumed or incurred by the Corporation heretofore or hereafter in any way arising out of or connected with any of the following:

(a) The investigation or examination of the Bank or its property preparatory to or connected with the transfer to the Corporation of the property sold or the negotiation or consummation of the purchase and sale provided for in this agreement;

(b) The supervision, administration, management, control, ownership, operation, improvement, reconstruction, modernization, repairing, replacement, restoration, protection, preservation, enforce-



ment, collection, liquidation, disposition, sale or resale of the property sold;

(c) Obligations or liabilities adjudicated against or imposed upon the Corporation, or voluntarily assumed by the Corporation by way of compromise or otherwise, arising out of or connected with the purchase by the Corporation of any of the property sold or this agreement or any phase of the transaction set forth in this agreement or any act or failure to act of the Corporation or any of its agents, with respect to any of the property sold, including, without being limited to, the expense of investigating, defending or prosecuting any claims or litigation and any counsel fees and Court costs connected therewith;

(d) Any act done or undertaking assumed or entered into by the Corporation at any time with respect to the Bank or for the benefit of the Bank or from which the Bank may derive any direct or indirect benefit in any way connected with the property sold, this agreement or any phase of the transaction set forth in this agreement, including without being limited to, any loss which the Corporation may sustain or liability which it may incur by reason of any property which the Corporation at any time may purchase or acquire from the Bank or any subsidiary corporation of the Bank, or any corporations, substantially all of the stock of which is owned or controlled by the Bank;

(e) Any other expenses, expenditures made or liabilities assumed or incurred by the Corporation bearing any reasonable relation to the property sold



or to any act or failure to act of the Corporation with respect to the property sold or to any phase of the transaction set forth in this agreement, whether of the same or different character as the expenditures or liabilities hereinbefore specifically enumerated;

(f) In each instance, the foregoing specifically enumerated items of expenditure or liability shall be deemed to include, without being limited to, salaries of employees of the Corporation, fees, commissions, charges and expenses paid or incurred by the Corporation to attorneys, accountants, real estate brokers, real estate operators, appraisers, engineers, security brokers, insurance brokers, auditors or other specialists; amounts paid or incurred for travel, subsistence, telephone, telegraphic or other communication facilities; amounts paid or incurred for the purchase, rental, operation and maintenance of automobiles, machinery equipment, furniture and fixtures; rentals paid or incurred for office space; amounts paid or incurred for real estate taxes, assessments, liens, encumbrances, due or charges; amounts paid or incurred for repairing, improving reconstructing, modernizing, preserving, restoring, replacing, managing or operating real estate, improvements on real estate or other property included in the property sold; the cost of bookkeeping, accountings, appraisals, examinations, audits or reports, and the cost of surety bonds, insurance and indemnifications of every kind or character and all other expenses of collection, enforcement, liquida-

tion, ownership, operation or resale of the property sold, or arising out of any phase of the transaction set forth in this agreement.

Any net income which may be received by the Corporation from the specific property sold pending the collection, enforcement, resale or other liquidation of such property by the Corporation, shall be considered recoveries from the operation by the Corporation of the property sold. If the Corporation shall elect at any time to foreclose a borrower's right, title to or interest in any collateral held as security to any of the "property sold" and to purchase said collateral at said sale, any gain realized from the resale by the Corporation of the property so purchased shall be considered recoveries from the "property sold" and any loss suffered from the resale of said property shall be deductible from said recoveries in determining the amount, if any, of the Further Sum. The Initial Cash Purchase Price and the Further Sum constitute the full consideration to be paid by the Corporation to the Bank. There shall be no liability or obligation upon the Corporation to pay any Further Sum unless and until the excess recoveries referred to in this Section in the definition of "Further Sum" shall have been actually received by the Corporation.

13. The right of the Bank under Section 12 of this agreement to a Further Sum is conditional, and limited to the receipt of the further sum, if any, which may become due it, determined as hereinbefore provided. This agreement does not give and

shall not be construed to give the Bank any right in or to any portion of the property sold which may remain after the Corporation shall have been fully reimbursed and no portion of such excess property shall revert to or revest in kind in the Bank. The Bank shall have no right to interfere by legal process or otherwise with the absolute management and control by the Corporation incident to its absolute ownership of the property sold, including, without being limited to, the right of the Corporation in its absolute and uncontrolled discretion to liquidate collect, exchange, sell or dispose of the property sold to is by the Bank at public or private sale, without notice to the Bank, item by item or in bulk, to make sales contracts and to agree to releases, extensions, compromises, compositions and adjustments, and to enter into contract of every kind or character with respect to such property and to do all things incident to its absolute ownership of the property. The Corporation shall not be held in any Court or otherwise to account for any act taken by it with respect to all or any item or portion of the property sold by the Bank to the Corporation, but shall be liable only to pay over to the Bank the Further Sum, if any, to which the Bank may become entitled under the terms of this agreement.

14. The Bank acknowledges that the sum of \$906,856.47 of clause (a) of the Initial Cash Purchase Price paid by the Corporation for the property sold exceeds the present or probably future realizable value of the property sold and agrees



that the finding or determination by unanimous vote of the directors of the Corporation, based upon the reports of the accounting department employees of the Corporation, of the amount of the further sum payable to the Bank under this agreement, or that nothing further is payable to the Bank, shall be binding and conclusive on the Bank, and the Bank agrees to indemnify and hold harmless the Corporation from any cost or expense of any kind or character arising out of any effort which it or any stockholders may make, notwithstanding the provisions hereof, through litigation or otherwise, to require any accounting or to dispute the conclusive effect of any finding or determination by the corporation.

15. The Bank authorizes the Corporation to make or cause to be made in such manner and at such times as the Corporation may determine, inspections and audits of any books, records and papers in the custody or control of the Bank and others relating to the financial or business condition of the Bank, including the making of copies therefor and extracts therefrom and the inspection and valuation of any of its assets. All constituted federal, state, municipal and other authorities, including but not being limited to, the United States Treasury Department, the Bureau of Internal Revenue, the Board of Governors of the Federal Reserve System and the Comptroller of the Currency are hereby authorized to furnish reports of examinations, records and other information relating to the conditions

and affairs of the Bank, upon request therefor by the Corporation, and are authorized to permit representatives of the Corporation to have full access from time to time to, and to make copies of and extracts from, all reports by or with respect to the Bank and all information concerning the Bank from time to time contained in their files and records.

16. The Bank warrants that the laws pursuant to which the Bank is incorporated and subject to which it conducts its business, and its articles of incorporation or charter, by-laws and other regulations, and the corporate proceedings heretofore taken, together with the approval of the Comptroller of the Currency heretofore received by the Bank, authorize and permit the Bank to sell property to the extent, in the manner and for the amount and on the terms set forth in this agreement.

17. Warranties against encumbrances in any deed to real estate heretofore or hereafter executed by the Bank in favor of the Corporation covering any item of real property sold, shall not be deemed to extent to unpaid taxes or local assessments which are or may become a lien on the real property so conveyed by the Bank to the Corporation.

18. This agreement sets forth an understanding orally agreed to between the parties hereto on August 17, 1942, and for the purpose of fixing the rights of the Corporation as a holder in due course or for value of any negotiable instrument as against any person liable thereon, the title of the Corporation shall be deemed to relate back to that date.

19. This agreement and any amendments or sup-

plements hereto, together with all conditions imposed by, and all collateral instruments executed or entered into with or for the benefit of the Corporation in connection with its purchase of the property sold pursuant to the application to the Corporation heretofore made by the Bank shall constitute the contract between the Bank and the Corporation. Such contract shall inure solely to the benefit of the Corporation its legal successors and assigns, and shall be binding upon and inure to the benefit of the Bank, its legal successors and assigns, but shall not be assignable by the bank as a whole or in part without the written consent of the Corporation, and shall not be construed to inure to the benefit of any parties other than the parties hereto.

20. No modification, recession, waiver, release or annulment of any part of such contract shall be effective, except pursuant to a written agreement subscribed by a duly authorized officer of the Corporation.

21. All exhibits, writings and contracts referred to in this agreement shall be and are incorporated herein by reference, with the same force and effect as if set forth herein at length.

22. The following instruments shall be deemed exhibits to this agreement:

Exhibit "A": Schedule as to the close of business on August 29, 1942, showing segregation of the assets of the Bank into "acceptable assets" and "unacceptable assets."

Exhibit "B": Schedules of property sold.



Exhibit "C": Certified copy of agreement providing for the sale of certain assets to and the assumption of deposit liabilities by The United States National Bank of Portland.

Exhibit "D": Certified copy of minutes of special meeting and adjourned special meeting of the Board of Directors of the Bank.

Exhibit "E": Certificate as to officers authorized to act for Bank.

Exhibit "F": Certified copy of minutes of special meeting of stockholders of the Bank.

Exhibit "G": Opinions of Counsel.

Exhibit "H": Certified copy of the articles of incorporation or charter, by-laws and regulations of the Bank including all amendments to date.

23. The rights and obligations of the parties hereto shall become effective forthwith upon disbursement by the Corporation of the amount of the initial cash purchase price provided to be paid in accordance with Section 12 of this agreement.

In Testimony Whereof, the parties hereto have executed this agreement by their officers thereunto duly authorized and the Bank has caused its corporate seal to be affixed hereto.

THE HARNEY COUNTY

BANK OF BURNS

By BEN BROWN

President

Attest:

[Seal]

LEON M. BROWN

Cashier

FEDERAL DEPOSIT INSUR-  
ANCE CORPORATION

By FRANCIS C. BROWN

Witness:

LUCY M. BROOKFIELD

State of Oregon,

County of Harney—ss.

On this 29 day of August, 1942, before me appeared Ben Brown to me personally known, who, being duly sworn, did say that he is the President of the Harney County National Bank of Burns, Burns, Oregon, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ben Brown acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

ORVAL D. YOKOM

Notary Public in and for said County and State.

My Commission expires April 7, 1946.

## LIABILITIES

Cash in T.....	\$962,575.63	
Cash in T.....	5,012.60	
Cash Iter.....	73.60	
Due from.....	1.00	\$ 967,662.83
Due from	_____	
Banking		
Prepaid T.....	\$ 66,740.56	
Prepaid T.....	230,141.26	
Postage S.....	1,470.98	
Recordak.....	15.00	298,367.80
Loans an	_____	
Stock &		
Other Re: D's.....	586.09	
Overdraftings.....	571.82	
Note exest. Savings.....	4.90	
Nationgawn on First		
Special Aland, Oregon..	255.68	1,418.49
Claim vs.	_____	_____
		\$ 1,267,449.12
		=====

Total Acc  
Add: Pur  
able A  
Non-Bo

red .....\$ 1,267,449.12

=====



Attest:

[Seal]

LEON M. BROWN

Cashier

FEDERAL DEPOSIT INSUR-  
ANCE CORPORATION

By FRANCIS C. BROWN

Witness:

LUCY M. BROOKFIELD

State of Oregon,  
County of Harney—ss.

On this 29 day of August, 1942, before me appeared Ben Brown to me personally known, who, being duly sworn, did say that he is the President of the Harney County National Bank of Burns, Burns, Oregon, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ben Brown acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

ORVAL D. YOKOM

Notary Public in and for said County and State.

My Commission expires April 7, 1946.

## EXHIBIT "A"

THE HARNEY COUNTY NATIONAL BANK  
BURNS, OREGON

AT THE CLOSE OF BUSINESS, AUGUST 29, 1942

## ASSETS

	Acceptable Assets	Unaccepted Assets	Total Assets
Cash in Vault .....	\$ 92,512.41		\$ 92,512.41
Cash in Transit .....	1,200.00		1,200.00
Cash Items .....	1,981.86		1,981.86
Due from U. S. National Bank.....	80,057.86		80,057.86
Due from Federal Reserve.....	159,082.26		159,082.26
Banking House and Fixtures.....	25,000.00		25,000.00
Prepaid Ins. on Bank Bldg.....	383.87		383.87
Prepaid F. D. I. C. Assessment.....	331.24		331.24
Postage Stamps .....	10.15		10.15
Reordak Films 6 x 5-50 .....	33.00		33.00
Loans and Discounts .....		\$ 253,192.62	253,192.62
Stock & Bonds .....		342,172.53	342,172.53
Other Real Estate .....		9.00	9.00
Overdraft Account .....		3,272.19	3,272.19
Note executed by Harney County National Bank .....		800,000.00	800,000.00
Special Account for Adjustment.....		150,000.00	150,000.00
Claim vs. Edward Brown Estate.....		268,187.03	268,187.03
<b>Total.....</b>	<b>\$360,592.65</b>	<b>\$ 1,816,833.37</b>	<b>\$ 2,177,426.02</b>

## LIABILITIES

Demand Deposits:		
Subject to Check .....	\$962,575.63	
Cashiers' Checks .....	5,012.60	
Certified Check .....	73.60	
Demand Certificates .....	1.00	\$ 967,662.83
Time Deposits:		
Ctfs. of Deposit .....	\$ 66,740.56	
Savings Accounts .....	230,141.26	
Postal Savings .....	1,470.98	
Cash Letters of Credit .....	15.00	298,367.80
Other Liabilities:		
Accrued Interest on C. D's.....	586.09	
Accrued Interest on Savings .....	571.82	
Accrued Interest on Post. Savings.....	4.90	
Outstanding Drafts drawn on First National Bank, Portland, Oregon..	255.68	1,118.49
<b>Total.....</b>		<b>\$ 1,267,449.12</b>

## RECAPITULATION

Total Acceptable Assets .....	\$ 360,592.65
Add: Purchase price of Unaccept- able Assets together with all Non-Book and Charged off Assets	906,856.47
<b>Total.....</b>	<b>\$ 1,267,449.12</b>

Total Liabilities Transferred ..... \$ 1,267,449.12

Certified Correct:

(Seal) HARNEY COUNTY NATIONAL BANK  
BURNS, OREGON

By LEON M. BROWN,  
Cashier





United States of America,  
District of Oregon—ss.

### CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 95 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 1412, in which Ruby M. Brown is plaintiff and appellant, and New York Life Insurance Company is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is \$35.70 and that the same has been paid by said appellant.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause together with exhibits 1 to 19, 26 to 28, 30 to 32, 34 to 36, 37 to 40 and 40 A, 44 to 46, 48 and 51.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 7th day of March, 1945.

[Seal]                      LOWELL MUNDORFF

Clerk

By F. L. BUCK

Chief Deputy. [95]

---

[Endorsed]: No. 11000. United States Circuit Court of Appeals for the Ninth Circuit. Ruby M. Brown, Appellant, vs. New York Life Insurance Company and Federal Deposit Insurance Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 9, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11000

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
Defendant,

FEDERAL DEPOSIT INSURANCE  
CORPORATION,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF RECORD TO BE PRINTED

Appellant hereby adopts as its points on appeal the Statement of Points appearing in the certified transcript of the record.

Appellant hereby designates for printing the following portions of the certified transcript on appeal:

- (1) Pretrial Order,
- (2) Opinion dated June 12, 1944, filed July 12, 1944,
- (3) Findings of Fact and Conclusions of Law,
- (4) Judgment Order,
- (5) Motion to Amend Pretrial Order and for a New Trial,
- (6) Affidavit in Opposition to Plaintiff's Motion to Amend Pretrial Order and for a New Trial,



- (7) Order denying Motion to Amend Pretrial Order and for a New Trial,  
 (7a) Notice of Appeal,  
 (8) Exhibit 34, and  
 (9) Exhibit 40.

/s/ HAMPSON, KOERNER,  
 YOUNG & SWEET  
 JAMES C. DEZENDORF  
 Attorneys for Appellant

State of Oregon  
 County of Multnomah—ss.

Service of the foregoing Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Record to be Printed by Copy, as prescribed by law, is hereby admitted at Portland, Oregon, this 15th day of March, 1945.

ROBT. F. MAGUIRE  
 Of Attorneys for Appellee

[Endorsed]: Filed March 19, 1945. Paul P. O'Brien, Clerk.

---

[Title of Circuit Court of Appeals and Cause.]

#### STIPULATION

In connection with the designations by Appellant and Appellee of the record to be printed herein,

It Is Hereby Stipulated and Agreed that Exhibits 39 and 40 shall be printed in full and that the first page of Exhibit 34, which is the summary of the numerous yellow sheets attached thereto, shall be printed but that the yellow sheets attached thereto

need not be printed and Appellant and Appellee request that the yellow sheets attached to the summary and all other exhibits which have been filed with the Clerk at San Francisco be considered in their original form because of the difficulty and expense incident to printing thereof.

Dated this 26th day of March, 1945.

JAMES C. DEZENDORF

Of Attorneys for Appellant,

ROBERT F. MAGUIRE

By ROBERT H. AGNEW

Of Attorneys for Appellee

[Endorsed]: Filed March 27, 1945. Paul P. O'Brien, Clerk.

---

[Title of Circuit Court of Appeals and Cause.]

ORDER

A stipulation so providing having heretofore been filed herein,

It Is Hereby Ordered that Exhibits 39 and 40 and the summary sheet of Exhibit 34 shall be printed and included in the printed record, and

It Is Further Ordered that the yellow sheets attached to the summary sheet of Exhibit 34 and all other exhibits filed herein shall be considered by this Court in their original form.

Dated at San Francisco, California, this 27th day of March, 1945.

FRANCIS A. GARRECHT

United States Circuit Judge

State of Oregon

County of Multnomah—ss.

Service of the foregoing Order by copy, as prescribed by law, is hereby admitted at Portland, Oregon, this 26th day of March, 1945.

ROBERT F. MAGUIRE

By ROBERT H. AGNEW

Attorney for Appellee

[Endorsed]: Filed March 27, 1945. Paul P. O'Brien, Clerk